82-1295

No.

IN THE

Supreme Court of the United States

October Term, 1982

ESCAMBIA COUNTY, FLORIDA, *et al.*,
Appellants,

v.

HENRY T. McMILLAN, *et al.*,
Appellees.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether an at-large election system required by a state constitution violates the fourteenth amendment to the United States Constitution where there is no evidence that the election system was created or is being maintained for discriminatory purposes.

2 Whether, following a decision holding unconstitutional under the fourteenth amendment to the United States Constitution an at-large election system required by a state constitution, a court may impose a judicially-created election system rather than allow the legislative body the opportunity to adopt a new election system where the state constitution and statutes provide the legislative body with expansive powers and do not prohibit it from adopting a remedial election system.

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Cases: Page

Page

Page

Constitutional and Statutory Provisions:

Page

Miscellaneous:

Page

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JURISDICTIONAL STATEMENT

Appellants Escambia County, Florida ("Escambia") and the members of the Escambia Board of County Commissioners ("County Commission"), [1] through counsel, submit this Juris-

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[1] The current members of the County Commission are John E. Frenkel, Jr.; Billy G. Tennant; Kenneth J. Kelson; Gerald Woolard; and Marvin Beck. The remaining parties to this action are: the Supervisor of Elections for Escambia, Joe Oldmixon, who is a defendant but is no longer a party to this appeal; Henry T. McMillan, appellee; Robert Crane, appellee; Charles L. Scott, appellee; William F. Maxwell, appellee; Clifford Stokes, appellee; and the class of all black citizens of Escambia, appellees. Appellants Woolard, Frenkel and Tennant have been substituted for Charles Deese, Jack Kenney and Zearl Lancaster respectively, who were members of the County Commission at the time the suit was brought. This suit also was brought against the School District of Escambia, the Escambia School Board and the members thereof. The School Board aspect of the case was resolved, McMillan v. Escambia County, Fla., 638 F.2d 1239 (5th Cir. 1981), and was not part of the judgment from which this appeal has been taken.

dictional Statement, and request the Court to note probable jurisdiction of appellants' appeal in the above-captioned action.

OPINIONS BELOW

The September 24, 1982 and February 19, 1981 decisions of the United States Court of Appeals for the Fifth Circuit in *McMillan v. Escambia County, Florida* are reported at 688 F.2d 960; 638 F.2d 1249; and 638 F.2d 1239, and are reprinted in Appendix A at 1a and Appendix B at 52a and 30a respectively. The December 3, 1979 Memorandum Decision and Order, the September 24, 1979 Memorandum Decision and the July 10, 1978 Memorandum Decision and Judgment of the United States District Court for the Northern District of Florida are unreported but are reprinted in Appendix B at 54a, 59a, 66a, 71a and 114a respectively.

JURISDICTION

Appellees brought this suit to challenge the at-large system of electing members of the County Commission, which system is required by Fla. Const. art. VIII, § 1(e), and alleged federal jurisdiction under 28 U.S.C. § 1331, 1343, 2201, 2202 (1976).

The Fifth Circuit entered judgment on September 24, 1982, and, on November 4, 1982, denied a suggestion of rehearing en banc. (The Judgment and the order denying the suggestion of rehearing are reprinted in Appendix C at 116a and 118a respectively.) On November 30, 1982, appellants filed with the United States Court of Appeals for the Fifth Circuit a Notice of Appeal to the Supreme Court of the United States. (The notice of appeal is reprinted in Appendix D at 120a.)

Pursuant to 28 U.S.C. § 1254(2) (1976), this Court has jurisdiction over the instant appeal.[2]

[2]The Fifth Circuit held that the provision of Florida's Constitution requiring county commissions to be elected at-large, as applied to elections for the County Commission, violates the fourteenth amendment to the United States Constitution. The Fifth Circuit also upheld the

CONSTITUTIONAL AND STATUTORY PROVISIONS

The provisions of U.S. Const. amend. XIV; Fla. Const. art. VIII, § 1; Fla. Stat. ch. 125 (1981), which are involved in this case, are reprinted in Appendix E at 122a, 123a and 126a respectively.

STATEMENT UNDER RULE 28.4(c)

Because this suit draws into question the constitutionality of Fla. Const. art. VIII § 1(e), 28 U.S.C. § 2403(b) (1976) may be applicable. No Court of the United States, as defined by 28 U.S.C. § 451 (1976), has certified to the Attorney General for the State of Florida, pursuant to 28 U.S.C. § 2403(b), the fact that the constitutionality of the above state constitutional provision has been drawn into question.

STATEMENT OF THE CASE[3]

I. Escambia County, Florida.

Escambia is a non-charter county[4] comprising approximately 661 square miles[5]. According to the 1970 census, the population

relief the district court ordered, which, inter alia, imposed a judicially created election system. In so doing, the Fifth Circuit interpreted Florida's Constitution as prohibiting the County Commission from adopting a new election system to remedy defects found in the existing system. It is appellants' position that this Court's appellate jurisdiction extends to all of the issues presented. *See* Rogers v. Lodge, ___ U.S. ___, 102 S.Ct. 3272 (1982). However, in the event that the Court determines that any of the issues presented does not fall within the Court's appellate jurisdiction, and that, as a result, it may not consider the entire matter on appeal, appellants then would request, pursuant to 28 U.S.C. § 2103 (1976), this jurisdictional statement to be treated as a petition for a writ of certiorari.

[3]Except as otherwise noted, the facts set forth herein are those facts in existence at the time of the trial – May, 1978.

[4]Pretrial stipulation, ¶ F(3).

[5]Bureau of the Census, U.S. Dept. of Commerce, PC80-1-A11, 1980 Census of Population – Florida 8 (1982).

of Escambia was 205,334, of whom 40,362, or 19.7%, were black.[6]

Pursuant to Fla. Const. art. VIII, § 1(e), non-charter counties, such as Escambia, are governed by five-member boards of county commissioners. County commissions have "such power of self-government as is provided by general or special law," and "may enact, in a manner prescribed by general law, county ordinances not inconsistent with general or special law . . . ."[7] Florida law enumerates specific powers of county commissions, but expressly provides that the power of county commissions to carry on self-government is not restricted to the enumerated powers.[8]

County commissioners are elected to four-year, staggered terms.[9] Candidates in the primary and general elections are elected at-large, but run only from the district in which each resides.[10] There is no majority vote requirement in the general election,

[6]Pretrial Stipulation, ¶ F(1). The current population of Escambia is approximately 233,794, of whom 45,945, or 19.7%, are black. Bureau of the Census, U.S. Dept. of Commerce, PC80-1-B11, 1980 Census of Population – Florida 15, 25 (1982).

[7]Fla. Const. art VIII,§ 1(f).

[8]Fla.Stat. § 125.01 (1981).

[9]Fla. Const. art. VIII, § 1(e).

[10]*Id.;* Fla. Stat. § 99.032 (1981). The at-large system for general elections was instituted in 1901. McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 5 (N.D. Fla. July 10, 1978) (Memorandum Decision) (except as otherwise indicated, further references to the district court's actions of July 10, 1978, are to the Memorandum Decision). Previously, between 1868 and 1901, the governor had appointed county commissioners. *Id.* at 4. By 1900 blacks had been disenfranchised, and in 1901, an amendment to the Florida Constitution establishing at-large elections was ratified. *Id.* at 5.

The at-large system for primary elections was not established until 1954. *Id.* at 5-6. In 1907 a statute was enacted which provided for candidates in the primaries to be elected from single-member districts. 1907 Fla. Laws, ch. 5697, § 1. In 1954 the Florida Supreme Court struck down this statute as violative of Florida constitutional require-

but there is such a requirement in the primary elections.[11]

Since 1945, when the Florida Supreme Court held unconstitutional the white primary,[12] there have been "no racially designated legal restrictions on the ability of black citizens of Escambia County to register, vote or campaign for the County Commission . . . ."[13] There also are no slating organizations.[14] The percentage of eligible blacks who have registered is roughly the same as the percentage of eligible whites, i.e., 66.9% of eligible blacks and 69.7% of eligible whites;[15] and blacks constitute 17% of the registered voters in Escambia.[16]

Blacks in Escambia are active in the Democratic Party. Approximately forty percent (40%) of the Escambia Democratic Committee is black.[17] The Secretary-Treasurer of the Democratic Executive Committee of Florida, William H. Marshall, is black, as is the Treasurer of the Escambia Democratic Executive Committee, John Reed, Jr.[18]

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ment of at-large elections. Ervin v. Richardson, 70 So.2d 585 (Fla. 1954). Due to that decision, subsequent primaries have been conducted under the at-large system.

[11]Fla. Const. art. VI, § 1(e); Fla. Stat. §§ 100.061, 100.091 (1981). There is a filing fee for each candidate equivalent to three percent, and a committee assessment of not more than two percent, of a county commissioner's annual salary. Fla. Stat. § 99.092(1) (1981). If, however, a candidate is unable to afford these fees, he or she may gain ballot access by means of a petition signed by three percent of the registered voters in the county from the candidate's party. *Id.* § 99.095(1).

[12]Davis v. State *ex rel.* Cromwell, 156 Fla. 181, 23 So.2d 85 (1945).

[13]Pretrial Stipulation, ¶ F(17).

[14]*Id.* ¶ F(18).

[15]*Id.* ¶ F(1).

[16]McMillan v. Escambia County, Fla. PCA No. 77-0432, typescript op. at 10 (N.D. Fla. July 10, 1978).

[17]Transcript, under separate cover, at 33-34 (testimony of William H. Marshall, Secretary-Treasurer of the Democratic Executive Committee of Florida).

[18]*Id.* at 17, 19. Mr. Marshall also had been the state committeeperson for the Escambia Democratic Executive Committee. *Id.* at 17.

The Democratic Party promotes equally black and white Democratic candidates who run for office in Escambia.[19] No black has run for the County Commission since 1970.[20] Between 1966 and 1970 three blacks ran for County Commission, but none was elected.[21] No other black has run for the County Commission.[22]

II. Proceedings Below.

On March 18, 1977, the named appellees filed this class action on behalf of themselves and all black citizens in Escambia against Escambia, the members of the County Commission, in their individual and official capacities, and the Supervisor of Elections, in his individual and official capacity, alleging that the at-large system, as designed and/or maintained, denies appellees equal access to the political process leading to the nomination and election to the County Commission in violation of the first, thirteenth, fourteenth, and fifteenth amendments to the Constitution and 42 U.S.C. §§ 1973, 1983 (1976).[23] As relief, appellees sought a declaratory judgment that the at-large election system violates the aforementioned constitutional and statutory provisions, an order enjoining appellants from holding elections under the at-large system, an order imposing a single-member district election system and an award of attorneys' fees and other costs.[24] Between May 15, 1978, and May 25, 1978, a non-jury trial was held before the Honorable

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[19] *Id.* at 20.

[20] Pretrial Stipulation, ¶ F(20).

[21] *Id.* One candidate, John Reed, ran twice — once in 1966 and once in 1970. *Id.*

[22] *Id.*

[23] Compl. ¶¶ II, IV, V(H).

[24] Compl. *ad damnum* clause.

Winston E. Arnow, and on July 10, 1978, the court entered a Memorandum Decision and a Judgment in favor of appellees.[25]

In reaching its decision, the court based its analysis initially on the criteria set forth by the Fifth Circuit in *Zimmer v. McKeithen*[26] for determining the existence of vote dilution (the "*Zimmer* factors").[27] With respect to the primary *Zimmer* factors, the court found that there are no slating organizations which prevent blacks from participating in the election system, that "active efforts are made to encourage" eligible blacks and whites alike to register and to vote, that "there is no significant difference between blacks and whites in that respect" and that white candidates "actively seek" the support of blacks.[28]

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[25]McMillan v. Escambia County, Fla., PCA No. 77-0432 (N.D.Fla. July 10, 1978). Trial of this action was consolidated with trial of Jenkins v. City of Pensacola, Fla., PCA No. 77-0433 (N.D. Fla. July 10, 1978), which suit was filed on the same day as *McMillan*. Plaintiffs in *Jenkins* made virtually the same allegations with respect to the Pensacola City Council as plaintiffs in *McMillan* made with respect to the County Commission and the Escambia School Board. The court's July 10, 1978 Memorandum Decision held for plaintiffs in both the *McMillan* and *Jenkins* suits. The *Jenkins* suit has been resolved, Jenkins v. City of Pensacola, Fla., 638 F.2d 1249 (5th Cir. 1981), *appeal* and *petition for cert. dismissed,* ____ U.S. ____, 102 S.Ct. 17 (1981) (by stipulation of the parties); McMillan v. Escambia County, Fla., 638 F.2d 1239 (1981), *appeal* and *petition for cert. dismissed sub nom.* City of Pensacola, Fla. v. Jenkins, ____ U.S. ____, 102 S.Ct. 17 (1981) (by stipulation of the parties), and is not part of this appeal.

[26]485 F.2d 1297 (5th Cir. 1973), *aff'd on other grounds sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976).

[27]The *Zimmer* factors are divided into two categories – "primary factors" and "enhancing factors". The primary factors are: access of the minority to the candidate selection process; responsiveness of the elected officials to the interests of the minority; the tenuousness of the state policy favoring at-large elections; and the effect of past discrimination on the ability of the minority to participate in the election system. *Id.* at 1305. The enhancing factors are: the existence of large districts; the presence of a majority vote requirement; the existence of an anti-single shot voting provision and the absence of a provision for candidates to run from geographic subdistricts. *Id.*

[28]McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 10, 15 (N.D. Fla. July 10, 1978).

However, the court concluded that blacks are denied access to the election system because they "have run time and again, and always lost," and because there has been a pattern of racially polarized voting.[29] The court also found that County Commissioners were responsive to the needs of blacks,[30] that the policy underlying the requirement of at-large elections was tenuous[31] and that past discrimination had caused racially polarized voting, which, in turn, has had the effect of reducing the participation in government by blacks.[32]

With respect to the enhancing *Zimmer* factors, the court acknowledged the existence of the residency requirement, the majority vote requirement in the general election and the absence of an anti-single shot voting provision.[33] However, the court observed that no one in recent history had won a general election without a majority and that, even though there is no anti-single shot voting provision, candidates run for numbered places, which renders blacks unable to concentrate their votes in a large field of candidates.[34] The court also determined that Escambia is "geographically large."[35] Taken in the aggregate,

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[29] *Id.* at 10-12.

[30] Appellees did not contest appellants' responsiveness in the following areas: water; sewers; traffic control; fire hydrants; mosquito control; library services; ambulance service; garbage collection and disposal; drainage planning; and housing and corrections. Pretrial Stipulation, ¶ F(22).

[31] This finding was based on the identical considerations as, and was subsumed in, the court's finding on intent. McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 16 (N.D.Fla. July 10, 1978). That finding is discussed at 9 *infra*.

[32] *Id.* at 15-18.

[33] *Id.* at 18. The court noted that there is a majority vote requirement in the primaries. *Id.*

[34] *Id.*

[35] *Id.*

the court found the *Zimmer* factors to show a dilution of black voting strength.[36]

Next, the court examined the issue of intent and concluded that "no discriminatory intent can be found as a motivating factor behind the 1901 amendment" to the Florida Constitution requiring at-large elections.[37] However, the court reached a different result as to the current maintenance of the at-large system. Of primary importance to the court were the County Commissioners' responses to the recommendations of two charter committees, appointed by the County Commission in 1975 and 1977, that county commissioners be elected from single-member districts.[38] The court observed that the County Commissioners testified at trial that they did not include either recommendation in the charter referendum because they believed that commissioners elected at-large would be more responsive to the needs of Escambia, as a whole, than would commissioners from single-member districts.[39] In addition, the court noted that, in their post-trial memorandum, appellants "admit[ted]" that the rejection of the single-member district proposals reflected the Commissioners' desire to retain their incumbency.[40] Based on this evidence, the court determined that the County Commissioners were responsible for retaining the at-large system, and drew the "inference" that race motivated the actions of the Commissioners.[41]

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[36] *Id.* at 19.

[37] *Id.* at 25.

[38] The committee appointed in 1975 proposed a seven-member county commission with five members to be elected from single-member districts and two members to be elected at-large. Plaintiffs' Post-Trial Proposed Findings of Fact and Conclusions of Law at 23. The committee appointed in 1977 proposed a five-member county commission with all members to be elected from single-member districts. *Id.*

[39] McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 29 (N.D. Fla. July 10, 1978).

[40] *Id.* at 30.

[41] *Id.* at 31.

In sum, the court concluded that the at-large system for election to the County Commission "effectively dilutes the votes of black citizens" and "is being maintained at least in part for discriminatory reasons."[42] As a result, the court held that the system violates the fourteenth and fifteenth amendments to the Constitution as well as 42 U.S.C. § 1973 (1976).[43] As relief, the court directed the parties to submit proposals to remedy the dilution which the court found the exist.[44]

On August 9, 1978, appellants filed a Notice of Appeal of the court's July 10, 1978 decision. Thereafter, the County Commission adopted, and submitted to the court, an ordinance reapportioning the county commissioners' districts and establishing an election system, which, as amended, provided for a seven-member county commission with five members to be elected from single-member districts and two members to be elected at-large.[45] Appellees proposed a plan which reapportioned the county commissioners' districts differently from appellants' plan and provided for a five-member county commission with all commissioners to be elected from single-member districts.[46]

During this time, the people of Escambia again were considering a change to a charter form of government, and, as a result, the court postponed consideration of the remedy until the proposed form of charter government became known.[47] The charter commission proposed, inter alia, a seven-member county commission with five members to be elected from single-member districts and two members to be elected at-large; and

[42] *Id.* at 32.

[43] *Id.* at 32, 34.

[44] *Id.* at 38; McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 1 (July 10, 1978) (Judgment).

[45] Notice of Adoption of Ordinance Amending Election Plan, Exhibit.

[46] Plaintiffs' Submission of Districting Plan for the County Commission and School Board at 1.

[47] McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 1 (N.D. Fla. Sept. 24, 1979) (Memorandum Decision).

a referendum election on the charter was scheduled for November 6, 1979.[48]

On September 24, 1979, the court issued a Memorandum Decision giving tentative approval to the election system contained in the charter proposal.[49] The court discussed the differences between appellants' plan and the charter plan, and observed that the two plans were "strikingly similar."[50] However, based on its interpretation of *Wise v. Lipscomb,*[51] the court disapproved appellants' plan.[52] The court reasoned that the Florida Constitution prohibits any system of electing county commissioners other than the at-large system which the court already had held unconstitutional, and that the Florida Constitution provides the County Commission only with such powers as the Florida Legislature provides by general or special

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[48] *Id.* at 1-2.

[49] *Id.* at 5.

[50] *Id.* at 2.

[51] 437 U.S. 535 (1978). The issue in *Wise* was whether a plan providing for an election system with a mixture of single-member and at-large districts, which the Dallas City Council had adopted in response to a declaratory judgment that the existing at-large system was unconstitutional, was a judicially imposed or a legislatively enacted plan. This determination was necessary because the Court previously had indicated that when a court holds unconstitutional an existing election system, it is held to a higher standard in fashioning a remedial election system than is a legislature. *Id.* at 540-41 (White, J.). This higher standard requires a court, absent special circumstances, to impose an election system comprised exclusively of single-member districts. *Id.*

[52] McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 3 (N.D. Fla. Sept. 24, 1979). In addition, the court indicated its disapproval of appellants' plan because that plan would not have resulted in blacks' being represented in proportion to their percentage of the population, but, rather, would have assured them of only 14.3% of the seats on the county commission. *Id.* at 4-5. Even though the charter proposal also would have resulted in the same proportion of representation for blacks, the court gave tentative proposal to that plan because plaintiffs did not object to it. *Id.* at 5.

law.[53] Therefore, the court held that, under *Wise*, the County Commission lacked the power to adopt a remedial election system, and that, in the event the charter proposal was rejected, the plan the court would implement would be treated as a judicially imposed plan, which only could provide for single-member districts.[54]

On November 6, 1979, the referendum was held, and the voters rejected the charter proposal.[55] On December 3, 1979, the Court issued a Memorandum Decision and an Order, imposing its plan for elections to the County Commission.[56] The plan which the court imposed provided for a five-member county commission with all of the members to be elected from single-member districts.[57] The boundaries which the court imposed were the same boundaries which appellees had proposed and the court had adopted as the Escambia school board's districts.[58] The court's Order also provided that, following each decennial census, the County Commission was to reapportion the county commissioners' districts to comply with the one-person, one-vote requirement and the orders of the court.[59]

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[53] *Id.* at 3.

[54] *Id.*

[55] McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 1 (N.D. Fla. Dec. 3, 1979) (Memorandum Decision).

[56] McMillan v. Escambia County, Fla., PCA No. 77-0432 (N.D. Fla. Dec. 3, 1979).

[57] McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 1-2 (N.D. Fla. Dec. 3, 1979) (Memorandum Decision), McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 1 (N.D. Fla. Dec. 3, 1979) (Order).

[58] McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 1-2 (N.D. Fla. Dec. 3, 1979) (Memorandum Decision); McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 1 (N.D. Fla. Dec. 3, 1979) (Order).

[59] McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 2 (N.D. Fla. Dec. 3, 1979) (Order).

Finally, pursuant to 42 U.S.C. § 1973a, the court retained jurisdiction over the suit for a period of five years.[60]

On January 3, 1980, appellants filed a Notice of Appeal of the court's December 3, 1979 decision, and, on January 23, 1980, moved the district court for a stay pending appeal of elections under the December 3 Order. On February 15, 1980, the court denied the motion,[61] and, on February 22, 1980, appellants filed a Notice of Appeal of that Order. Also on February 22, 1980, appellants moved the Fifth Circuit for a stay pending appeal of the district court's December 3 Order. On March 10, 1980, the Fifth Circuit stayed the December 3 Order.[62]

On February 19, 1981, the Fifth Circuit rendered its decision in *McMillan v. Escambia County, Florida* (*McMillan I*)[63] reversing that part of the district court's July 10, 1978 decision concerning the at-large election system of electing county commissioners. In so doing, the court first agreed with the district court's finding that racial considerations were not a factor behind the enactment of the 1901 amendment to the Florida Constitution requiring at-large elections.[64] However, the court disagreed with the district court's finding that appellants were maintaining the at-large system for discriminatory purposes.

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[60]*Id.* at 3.

[61]McMillan v. Escambia County, Fla., PCA No. 77-0432 (N.D. Fla. Feb. 15, 1980) (Order).

[62]McMillan v. Escambia County, Fla., No. 78-3507 (5th Cir. Mar. 10, 1980) (Order). This Order also consolidated for oral argument and disposition appellants' earlier appeal of the district court's July 10, 1978 Judgment, as well as the appeal of the district court's July 10, 1978 Judgments with respect to the Escambia School Board and the Pensacola City Council.

[63]638 F.2d 1239 (5th Cir. 1981). The Fifth Circuit affirmed those parts of the district court's decision concerning the election systems for the Escambia School Board and the Pensacola City Council. *Id.*

[64]*Id.* at 1244.

The court reviewed the record, and "found no evidence of racial motivation by the County Commissioners in retaining the at-large system."[65] With respect to the expression by the Commissioners of the desire to retain their incumbency, the court reasoned that "the desire to retain one's incumbency unaccompanied by other evidence ought not to be equated with an intent to discriminate against blacks *qua* blacks."[66] The court observed that the Commissioners testified that "'good government'" reasons, not race, motivated them to delete from the charter referendum the proposals for single-member districts and that appellees introduced no evidence to the contrary.[67] The court admonished that "[t]he trial judge, of course, was entitled not to believe the commissioners' testimony; in the absence of contradictory evidence, however, disbelief of that testimony is not sufficient to support a contrary finding."[68] Because there was no contradictory evidence, the Fifth Circuit held that "the evidence falls short 'of showing that the appellants 'conceived or operated [a] purposeful [device] to further racial discrimination.'"[69] Accordingly, the court reversed the portion of the district court's opinion invalidating the at-large system of electing county commissioners.[70]

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[65] *Id.* at 1245.

[66] *Id.*

[67] *Id.* at 1244-45.

[68] *Id.* at 1245.

[69] *Id.* at 1245 (quoting City of Mobile, Ala. v. Bolden, 446 U.S. 55, 66 (1980) (quoting Whitcomb v. Chavis, 403 U.S. 124, 149 (1971))).

[70] The Fifth Circuit's analysis and decision was based entirely on the fourteenth amendment. The court rejected appellees' claims under the fifteenth amendment and 42 U.S.C. § 1973 (1976). The court reasoned that in City of Mobile, Ala. v. Bolden, 446 U.S. 55 (1980), a plurality of this Court held that section 1973 "has an effect no different from that of the Fifteenth Amendment," 446 U.S. at 61, and that, even assuming section 1973 allowed a private right of action, appellees could not succeed under that section unless they also could succeed under the fifteenth amendment. 638 F.2d at 1242 n.8. The court adopted the *Bolden* plurality's view that the fifteenth amendment does not apply to vote dilution claims. *Id.* at 1243 n. 9.

In a separate decision, *McMillan v. Escambia County, Florida* (*"McMillan II"*),[71] the court, based on its decision in *McMillan I*, vacated the December 3, 1979 remedy the district court had ordered.

Thereafter, on April 1, 1981, appellees filed a Petition for Rehearing and a Suggestion of Rehearing En Banc. While the petition and suggestion were pending, the 1980 census was published; and on December 22, 1981, the County Commission, pursuant to Fla. Const. art. VIII, § 1(e); Fla. Stat. § 124.01 (1981), reapportioned the county commissione s' districts.[72] Also while the petition and suggestion were pending, this Court received briefs, and heard argument in, *Rogers v. Lodge*.[73] The Fifth Circuit stayed consideration of appellees' petition and suggestion pending the decision in *Rogers*, and, following that decision, requested the parties to submit briefs on the effect of *Rogers*. Without other briefing and without oral argument, on September 24, 1982, the court granted appellees' petition for rehearing, and, based on *Rogers*, vacated its decision in *McMillan I* concerning elections to the County Commission and its decision in *McMillan II*, and substituted its decision in *McMillan v. Escambia County, Florida ("McMillan III")*.[74]

The court first examined the impact of *Rogers*, and observed that, in *Rogers*, the Court reaffirmed the holding of a majority in *City of Mobile, Alabama v. Bolden*[75] that evidence of discriminatory purpose is necessary to sustain a challenge to an election system under the equal protection clause of the four-

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[71]638 F.2d 1249 (5th Cir. 1981).

[72]Minutes of December 22, 1981 County Commission Meeting at 5-6.

[73]___ U.S. ___, 102 S.Ct. 3272 (1982).

[74]688 F.2d 960 (5th Cir. 1982). On October 22, 1982, the court denied appellees' suggestion of en banc consideration. McMillan v. Escambia County, Fla., Nos. 78-3507, 80-5011 (5th Cir. Oct. 22, 1982).

[75]446 U.S. 55 (1980).

teenth amendment.[76] The court also determined that *Rogers* gave greater weight to the *Zimmer* factors and, by applying the "clearly erroneous" standard of Fed. R. Civ. P. 52 to findings of discriminatory intent, greater deference to the findings by the district court than had the *Bolden* plurality.[77] In view of these determinations and its determination that, consistent with *Rogers*, the district court had not limited its inquiry to the *Zimmer* factors, the court held that the district court had applied the proper legal standard applicable to vote dilution cases.[78]

The court then reiterated the district court's findings and concluded that, under *Rogers*, it could not "say the district court's finding of intent was clearly erroneous."[79] Therefore, the court upheld the district court's July 10, 1978 decision concerning elections to the County Commission.

Because the court upheld the July 10, 1978 decision, it then reviewed the district court's December 3, 1979 remedy. The court agreed with the district court's analysis of the remedy issue, held that the remedial plan ordered by the district court was within that court's discretion, and, accordingly, affirmed the district court's December 3, 1979 decision.[80] Due to the

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[76] *McMillan III*, 688 F.2d at 964.

[77] *Id.* at 964-965.

[78] *Id.* at 965. The court indicated that the district court had gone beyond the *Zimmer* factors by looking into, and drawing an inference from, the County Commission's responses to the single-member district proposals. *Id.*

[79] *Id.* at 965-69. The court did not address appellees' arguments based on 42 U.S.C. § 1973 (1976), *as amended by* Pub. L. No. 97-205, 96 Stat. 131 (1982), because it had not afforded appellants the opportunity to respond to those appellees' arguments. *Id.* at 961 n. 2. The court also did not address appellees' fifteenth amendment claims. *Id.* However, the court concluded that *Rogers*, which did not address either the fifteenth amendment or section 1973, provided "no basis for departing from the *Bolden* plurality's analysis." *Id.*

[80] *Id.* at 969-73. Specifically, the court agreed with the distinction the district court drew between this case and *Wise v. Lipscomb*. The court reached this result by adopting the analysis of Justices White,

to the passage of time between the December 3, 1979 decision and the decision in *McMillan III*, the Fifth Circuit remanded the case to the district court with instructions to revise the scheduling terms of the remedial order.[81]

THE QUESTIONS ARE SUBSTANTIAL

I. An At-Large Election System Is Not Unconstitutional Per Se, and May Not Be Invalidated Where There Is No Evidence Showing that the System Was Created or Is Being Maintained for Discriminatory Purposes.

The Fifth Circuit's decision in *McMillan III* to vacate its decision in *McMillan I* was premised entirely on its erroneous conclusion that this Court's decision in *Rogers* shows "a more favorable view of the *Zimmer* factors and a greater deference to the finding of the district court than the analysis of the *Bolden* plurality."[82] Equally erroneous was the Fifth Circuit's application of the standard which, in light of *Rogers*, it perceived as governing challenges under the fourteenth amendment to at-large election systems. The court did not digress from its finding in *McMillan I* that there was no evidence to show that the at-large system for election to the County Commission is being maintained for a discriminatory purpose. Nevertheless, the court upheld the district court's decision that the at-large system violates the fourteenth amendment.

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joined in by Justice Stewart, rather than the analysis of Justice Powell, joined in by Chief Justice Burger and Justices Blackmun and Rehnquist, because, in the court's view, the analysis of Justice White controlled the outcome of the suit. *Id.* at 972. Based on this analysis, the court concluded that the Florida Constitution limits the power of the County Commission to the powers specifically authorized by state law, which does not include the power to adopt a remedial election system; thus the County Commission lacks the power to adopt such a system. *Id.*

[81] *Id.* at 973. The Fifth Circuit denied appellants' motion for a stay of mandate, McMillan v. Escambia County, Fla., Nos. 78-3507, 80-501 (5th Cir. Nov. 23, 1982), and Justice Powell denied appellants' application for stay of judgment, McMillan v. Escambia County, Fla., No. A-494 (U.S. Dec. 2, 1982).

[82] *Id.* at 964.

To invalidate an at-large election system where there is no evidence that the system was established or is maintained for discriminatory purposes is tantamount to holding at-large election systems unconstitutional per se. This Court consistently has refused to make such a holding,[83] and the Fifth Circuit must not be allowed to effect such a drastic change in constitutional law.

A. The Court in *Rogers* Applied the Same Legal Standard to the Finding of Discriminatory Intent as the Plurality Applied in *Bolden*.

In *Bolden* the plurality reiterated that an at-large election system could violate the fourteenth amendment only if its "purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities" and, that, therefore, "[a] plaintiff must prove that the disputed plan was 'conceived or operated as [a] purposeful devic[e] to further racial . . . discrimination.'"[84] Consistent with this requirement, the plurality reasoned that while, "the presence of the indicia relied on in *Zimmer* may afford some evidence of a discriminatory purpose, satisfaction of those criteria is not of itself sufficient proof of such a purpose."[85] The majority opinion in *Rogers* sets forth the same standard, and, because it is a majority opinion, firmly establishes that standard as law.

In *Rogers* the Court also reiterated that at-large election systems only "violate the Fourteenth Amendment if 'conceived or operated as purposeful devices to further racial . . . discrimination' by minimizing, cancelling out or diluting the voting strength of racial elements in the voting population."[86]

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[83] *E.g., Rogers*, 102 S.Ct. at 3275; White v. Regester, 412 U.S. 755, 765 (1973); Whitcomb v. Chavis, 403 U.S. 124, 142 (1971).

[84] 446 U.S. at 66 (quoting Whitcomb v. Chavis, 403 U.S. 124, 149-50 (1971)).

[85] *Id.* at 73.

[86] 102 S.Ct. at 3275 (quoting Whitcomb v. Chavis, 403 U.S. 124, 149-50 (1971)).

The Court then discussed and rejected the argument that the district court's decision holding unconstitutional Burke County's at-large election system was infirm because the court had relied on the *Zimmer* factors:

> [W]hile recognizing that the evidentiary factors identified in *Zimmer* were to be considered, the District Court was aware that it was 'not limited in its determination only to the *Zimmer* factors' but could consider other relevant factors as well.[87]

For this reason, the Court concluded that the district court had applied the proper legal standard.[88]

It is apparent, therefore, that the plurality opinion in *Bolden* and the majority opinion in *Rogers* both adopted and applied the identical legal standard. As a precondition to a court's invalidating an at-large election system, both opinions require a plaintiff to prove that the system was created or is maintained for discriminatory purposes, and also provide that the proof and findings may not be limited to the *Zimmer* factors.

With respect to the deference accorded the findings of a district court, this Court in *Rogers* expressly held that, pursuant to Fed.R.Civ. P.52, a district court's findings concerning discriminatory intent are not to be disturbed unless clearly erroneous.[89] Although the plurality in *Bolden* did not address specifically this issue, there is no doubt, particularly in light of the plurality's lengthy discussion of the district court's findings,[90] that it too applied the clearly erroneous standard. The difference in outcomes between *Rogers* and *Bolden* is attributable solely to the facts of each case, including the failure of the district court in *Bolden* to make findings beyond the *Zimmer* factors, and not to the application of a different legal stan-

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[87] *Id.* at 3278 (quoting district court opinion).

[88] *Id.*

[89] *Id.* at 3278-79.

[90] 446 U.S. at 71-75.

dard. The Fifth Circuit, therefore, erred severely in concluding that *Rogers* established a different legal standard from the plurality opinion in *Bolden* and in basing the reversal of its opinion in *McMillan I* on that conclusion.

B. There Is No Evidence that the At-Large Election System Was Created or Is Being Maintained for Discriminatory Purposes.

Of additional concern is the Fifth Circuit's application of the clearly erroneous standard to the findings of the district court because, evidently, the court interpreted this standard as precluding it absolutely from reversing the district court's finding of discriminatory intent. This is most dramatically illustrated by the Fifth Circuit's discussion of the district court's interpretation of the County Commission's responses to the charter committees' proposals for single-member districts, which the Fifth Circuit concluded was the one indication that the district court had not limited its inquiry to the *Zimmer* factors.[91]

In *McMillan I* the court reviewed the entire record, including the Commissioners' testimony that they rejected the portion of the charter proposal providing for single-member district elections for good government reasons and the indication in appellants' post-trial memorandum that the Commissioners' actions also were based on the desire to retain their incumbency, and found "no evidence of racial motivation by the County Commissioners in retaining the at-large system."[92] In reaching this conclusion, the court emphasized that appellees had failed to offer any "contradictory evidence."[93]

The Court did not alter this finding in *McMillan III*. Indeed, with respect to the element which was of greatest significance to the district court — the Commissioners' desire to retain their in-

[91] *McMillan III*, 688 F.2d at 965.

[92] 638 F.2d at 1244-45.

[93] *Id.* at 1245.

cumbency – the court specifically noted that "we do not depart from our prior conclusion that desire to maintain one's incumbency does not equal racially discriminatory intent."[94] If the *Zimmer* factors, alone, may not equal discriminatory intent, and the only additional factor shows an absence of such intent, then it must be clearly erroneous for a court to find that an election system is being maintained for discriminatory purposes. The Fifth Circuit erred in so failing to hold.

An equally fundamental reason why the courts below were precluded from finding discriminatory intent is that, irrespective of appellants' actions, appellants in no way could be responsible for the creation or maintenance of the at-large election system. That system is, and always has been, required by the Florida Constitution. Appellants played no role whatsoever in the enactment of the constitutional provision; and any change in that provision would require an amendment to Florida's Constitution, a process over which appellants have no control.[95] Appellees not only failed to name as parties those persons or entities arguably responsible, at least in part, for the creation and maintenance of the constitutional requirement of at-large elections, e.g., the State of Florida, the Governor of Florida or the members of the Florida Legislature, but, more importantly, also failed to offer evidence, and the courts failed to find, that this constitutional provision is being maintained for discriminatory purposes.[96]

Although Fla. Stat. § 125.60 (1981) allows a majority of the qualified electors of a non-charter county to adopt a charter which provides a system for electing county officials, on November 6, 1979, the people of Escambia rejected a proposal for a change to a charter government.[97] That proposal, inter

[94] *McMillan III*, 688 F.2d at 969 n. 19.

[95] *See* Fla. Const. art. XI.

[96] In a letter to counsel dated August, 4, 1977, Judge Arnow, with-explanation, rejected appellants' argument that the State and the Governor should have been joined as parties.

[97] *See supra* p. 10-12. Sixty-two (62) of Florida's sixty-seven (67) counties have remained non-charter counties.

alia, provided for a seven-member county commission with five members to be elected from single-member districts and two members to be elected at-large.[98] Even assuming that the actions of the people of Escambia may be attributable to appellants, no evidence was introduced and no finding was made showing that racial considerations were a factor in the people's rejection of the charter proposal.[99]

Accordingly, because appellants were and are not a factor behind the creation and maintenance of the at-large system of electing members of the County Commission, the inquiry should not have focused on their actions. Under these circumstances, the courts could not have found that appellants are maintaining the at-large system for discriminatory reasons.

Even assuming, arguendo, that the inquiry should have focused on the actions of appellants, and, further, that the presence of an aggregate of the *Zimmer* factors, alone, were sufficient to sustain appellees' claims,[100] there still is no evidence that race is a motivating factor behind the maintenance of the at-large system. In examining this case under the *Zimmer* analysis, one is struck immediately by the dramatic difference between the facts herein and the facts of *Rogers*. With respect to the primary *Zimmer* factors, there may be no doubt, first, that

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[98] *Id.*

[99] Although the County Commission previously had played a role in the presentation for referendum of a charter proposal and had stricken from the proposal the provision for county commissioners to be elected from single-member districts, as the Fifth Circuit concluded in *McMillan I*, the uncontroverted evidence established that race was not a factor behind that decision. 638 F.2d at 1245. As discussed at 20 *supra*, the Fifth Circuit did not depart from this conclusion in *McMillan III*.

[100] Appellants already have shown, and the Fifth Circuit has agreed, that race was not a consideration behind the one factor which the Fifth Circuit determined to be a non-*Zimmer* factor, *supra* pp. 14, 20-21.

blacks are afforded full access to the candidate selection process and to the entire elector process. Unlike *Rogers*, where blacks were a "substantial majority" of the population but a "distinct minority" of the registered voters,[101] blacks in Escambia constitute approximately the same percentage of the registered voters as they do percentage of the population.[102] Indeed, the district court found that "active efforts" are made to encourage blacks to vote, and that eligible blacks and whites register at approximately the same rate.[103] The court also found that there are no slating organizations which deny blacks access to the election system, and that white candidates "actively seek" the support of blacks.[104] Apart from these findings, the record reveals that blacks are active in the Democratic Party.[105]

Also unlike *Rogers*, there is no "overwhelming evidence of bloc voting along racial lines"[106] in elections for the County Commission. Although the court found racial polarization of voting, its finding was based almost exclusively on statistical evidence presented by appellees.[107] In view of the fact that only three blacks have run for the County Commission, that statistical evidence and the finding derived therefrom are, at best, dubious. This is confirmed by appellees' own expert, Dr. Charles L. Cottrell, who, in testifying about appellees' statistical

[101]102 S.Ct. at 3279.

[102]*See supra* p. 5.

[103]McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 10 (N.D.Fla. July 10, 1978).

[104]*Id.* at 10, 15.

[105]*See supra* pp. 5-6.

[106]*Rogers*, 102 S.Ct. at 3279.

[107]McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 12-15, 17-18 (N.D. Fla. July 10, 1978). The court also found that the filing fee denies blacks access to the candidate selection process. *Id.* at 10. However, in making this finding the court failed to discuss the reasons underlying the filing fee or to recognize the fact that, if a candidate is unable to afford the fee, he or she may gain ballot access through a petition signed by only three percent of the registered voters in the county from the candidate's party, *see supra* note 11.

evidence, expressed doubt that a finding could be made on racial polarization in elections for the County Commission because of the small number of blacks who had run for that office.[108] In view of the highly questionable nature of the statistical evidence on polarization, and the absence of corroborating evidence, there was no basis for any finding other than that blacks are able to participate fully in all aspects of the political process.[109] The district court clearly erred in finding

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[108]Transcript, under separate cover, at 30-31. There are additional flaws in the method appellees used to determine the existence of racial polarization. For example, such factors as incumbency and the relative qualifications of the candidates were not taken into account. Transcript at 307-338 (testimony of appellees' expert, Dr. Glenn D. Curry). Also, racial polarization could be found where a black wins an election, if blacks only vote for the black candidate and whites also vote for the black candidate but to a lesser extent. *Id.* at 333-38; *Id.*, under separate cover, at 50-51 (testimony of appellants' expert, Dr. Manning J. Dauer).

[109]The majority of the statistical evidence and testimony concerning the polarization issue, as well as the court's discussion of that issue, centered on elections for the Pensacola City Council and the Escambia School Board, McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 12-15 (N.D. Fla. July 10, 1978). A larger number of blacks had run for those offices than had run for the County Commission. Accordingly, there may have been more of a basis for the court's findings of polarization in those elections than in elections for the County Commission. It appears that the court's finding of polarizaton in elections for the County Commission was based more on its interest in consistency than on the facts presented concerning County Commission elections.

This observation is applicable generally to other findings the court made. As reflected in the court's July 10, 1978 opinion, the evidence which was presented centered on the facts surrounding the creation and maintenance of the systems for electing persons to Escambia School Board and the Pensacola City Council, which have no bearing on the creation and maintenance of the system of electing county commissioners. In view of the absence of evidence of discriminatory intent in the County Commission aspect of this suit, it is evident that the district court did not review the facts, and make its finding of intent, independently of its findings on the School Board and City Council

otherwise.[110]

As to the remaining primary *Zimmer* factors, even the district court found the County Commission to be responsive to the needs of Escambia's black citizens, and race not to be a motivating factor behind Florida's adoption of the at-large election system.[111] Additionally, for the reasons discussed at 20-21 *supra,* race is not a factor behind the maintenance of the at-large system.

Because none of the primary *Zimmer* factors is present, there is nothing to be enhanced, and it should be unnecessary to consider the enhancing *Zimmer* factors. Even if considered, however, these factors add nothing to appellees' case; and, again, the facts are distinguishable from the facts in *Rogers.* In *Rogers* there was a majority vote requirement, no requirement that candidates run from geographic subdistricts and a finding that the size of Burke County impaired the access of blacks to the political process.[112] In the instant suit the district court recognized that there is no anti-single shot voting provision, no majority vote requirement in the general election, and a requirement that candidates reside in the district from which they run.[113] Although the court found Escambia to be geographically large, the court offered no explanation of this finding, particularly in the context of its impact on the ability of blacks to

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election systems. Rather, the court apparently applied the evidence concerning those elections systems to support its finding that the at-large system of electing county commissioners is being maintained for a discriminatory purpose.

[110]Under *Zimmer,* the fact that blacks are able to participate fully in the elector process obviates the need to discuss past discrimination.

[111]*Id.* at 15, 25. In *Rogers* the district court found that elected officials in Burke County were unresponsive to the needs of blacks and that the at-large election system had been subverted to invidious purposes. 102 S.Ct. at 3280.

[112]105 S.Ct. at 3274, 3280-81.

[113]McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 18 (N.D.Fla. July 10, 1978).

participate in the political process.[114] That finding, therefore, is meaningless.

In sum, an aggregate of the *Zimmer* factors fails to support and, in fact contradicts, the district court's finding, and the Fifth Circuit's affirmance, that the at-large system of elections to the County Commission is being maintained for a discriminatory purpose. All that appellees have been able to show is that blacks have not been elected to the County Commission in proportion to their percentage of the population. Such a showing, however, provides an insufficient basis for striking down as violative of the fourteenth amendment an at-large election system.[115] This Court must not permit the Fifth Circuit to rewrite constitutional law to allow an at-large election system to be struck down where there is no evidence that it was established or is being maintained for discriminatory purposes.

II. The Imposition of a Court-Ordered System of Elections To Remedy a Defect Found To Be Present in an Existing Election System Is an Unwarranted Intrusion into a Legislative Function Where the Legislative Body Has the Power, Following a Decision Invalidating as Applied a State Constitutional Provision Requiring At-Large Elections, To Adopt a Remedy.

This Court consistently has held that the adoption of an election system is a legislative, not a judicial, function.[116] The

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[114] *Id.* It is noteworthy that Escambia is geographically smaller than a majority of counties in Florida. Of Florida's sixty-seven (67) counties, thirty-seven (37) are smaller than Escambia. Bureau of the Census, U.S. Dept. of Commerce, PC80-1-A11, 1980 Census of Population-Florida 8 (1982).

[115] *Bolden*, 446 U.S. at 666 (plurality opinion); White v. Regester, 412 U.S. 755, 765-66 (1973); Whitcomb v. Chavis, 403 U.S. 124, 149-50 (1971).

[116] Wise v. Lipscomb, 437 U.S. 535, 539-40, 550 (1978); Connor v. Finch, 431 U.S. 407, 414 (1977); Chapman v. Meier, 420 U.S. 1, 26-27 (1975); *see* Burns v. Richardson, 384 U.S. 73, 89 (1966).

courts below disregarded this teaching, and, rather than considering the election system the County Commission adopted and proposed to the district court, imposed a court-ordered system.

Underlying both courts' decisions was their interpretation of Fla. Const. art. VIII, § 1(f) and *Wise v. Lipscomb*. As noted at 16 n. 80 *supra*, the Fifth Circuit specifically concluded that the opinion of Justice White controlled the outcome of *Wise*, and, therefore, adopted its interpretation of Justice White's analysis as the governing standard for the instant suit.[117] Of particular significance was Justice White's observation that there was no state constitutional, statutory or judicial prohibition on the authority of the Dallas City Council to enact a new election system where its existing system had been held unconstitutional.[118] The courts below concluded that, unlike Texas law, Fla. Const. art. VIII, § 1(f) "expressly limits the legislative powers of the County Commission to those specifically authorized by state law," which does not include authorization for a non-charter county commission to adopt a remedial election system.[119] Even assuming that the courts were correct in adopting Justice White's analysis, the most cursory reading of the Florida Constitution and statutes conclusively establishes that the courts erred in holding that the powers of non-charter county commissions are limited to those enumerated by state law, and that, therefore, Florida law prohibits the County Commission from enacting a remedial election system.

The portion of Fla. Const. art. VIII, § 1(f) which governed the courts' holding is the language which provides: "Counties

[117]The district court indicated that it too adopted as controlling the analysis of Justice White. *See* McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 2-3 (N.D. Fla. Sept. 24, 1979).

[118]*McMillan III*, 688 F.2d at 972; *accord* McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 2 (N.D. Fla. Sept. 24, 1979).

[119]*McMillan III*, 688 F.2d at 972; *accord* McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 3 (N.D. Fla. Sept. 24, 1979).

not operating under county charters shall have such power of self-government as is provided by general or special law."[120] Both courts, however, ignored the remaining portion of that section, as well as the Florida statutes and a Florida Supreme Court decision on the powers of non-charter county governments. Specifically, Fla. Const. art. VIII, § 1(f) also provides that "[t]he board of county commissioners of a county not operating under a charter may enact . . . county ordinances *not inconsistent with* general or special law."[121] Florida statute provides: "The legislative and governing body of a county shall have the power to carry on county government. To the extent *not inconsistent with* general or special law, *this power* shall include, but *shall not be restricted* to . . . ."[122] As interpreted by the Florida Supreme Court,

> [t]his provision of the Florida Constitution [art. VIII, § 1(f)] also authorizes the board of county commissioners of such a county to enact ordinances in the manner prescribed by Chapter 125, Florida Statutes, which are not inconsistent with general law.
>
> The intent of the legislature in enacting the recent amendments to Chapter 125, Florida Statutes, was *to enlarge the powers of counties* through home rule to govern themselves.
>
> . . . Unless the legislature has preempted a particular subject relating to county government by either general or special law, the county governing

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[120]Both courts quoted Fla. Const. art. VIII, § 1(f). The district court, however, erroneously quoted this section as providing that "the Escambia County Commission has *'only* such power of self government [sic] as is provided by general or special law.'" McMillan v. Escambia County, Fla., PCA No. 77-0432, typescript op. at 3 (N.D. Fla. Sept. 24, 1979) (emphasis added). This inaccurate quotation apparently was a major factor in the court's erroneous decision.

[121](Emphasis added).

[122]Fla Stat. § 125.01 (1981) (emphasis added).

> body, by reason of this sentence [in Fla. Stat. § 125.01] has authority to act through the exercise of home rule power.[123]

As is readily apparent, the powers of non-charter county commissions are expansive. Florida has not attempted to preempt the power of a non-charter county government to adopt by ordinance a remedial election system following a decision invalidating the State's constitutional provision requiring at-large elections. Therefore, even under Justice White's analysis in *Wise*,[124] the County Commission had the power to adopt by ordinance a remedial election system, and the Fifth Circuit should not have upheld the district court's intrusion upon this power.[125]

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[123]Speer v. Olson, 367 So.2d 207-11 (Fla. 1978) (emphasis added). The interpretation of state law by the highest court of a state is, of course, binding on this Court and all other federal courts. *E.g.*, Brown v. Ohio, 342 U.S. 161, 167 (1977); Gurley v. Rhoden, 421 U.S. 200, 208 (1975); Garner v. Louisiana, 368 U.S. 157, 169 (1961).

[124]Presumably, if the courts below had adopted the analysis in *Wise* of Justice Powell, they would have upheld the election system the County Commission adopted. That analysis was not dependent at all on whether a legislative body "became imbued" with the power to adopt an election system after the existing system was struck down. 437 U.S. at 548. Instead, Justice Powell focused on the fact that the Dallas City Council had "exercised a legislative judgment, reflecting the policy choices of the elected representatives of the people, rather than the remedial directive of a federal court." *Id.*

[125]The Fifth Circuit did not address specifically the issue of the reapportionment of the county commissioners' districts. However, the December 3, 1979 Order which the court affirmed in *McMillan III* provided for the immediate imposition of a court-ordered reapportionment plan and, thereafter, for the County Commission, following each decennial census, to reapportion the county commissioners' districts in accordance with the principle of one-person, one-vote and the orders of the court. The arguments which appellants have made with respect to the imposition by the courts of a judicially created election system would have applied even more forcefully with respect to the imposition of the court-ordered reapportionment plan because the Florida Constitution and statutes expressly provide county commis-

CONCLUSION

For the foregoing reasons, the questions are substantial, and the Court should note probable jurisdiction.

Respectfully submitted,

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sions with the power and duty to reapportion county commissioners' districts. Fla. Const. art. VIII, § 1(e); Fla. Stat. § 124.01 (1981).

Due to the fact that, prior to the decision in *McMillan III*, the Commerce Department published the 1980 census and that, as discussed at 15 *supra*, the County Commission reapportioned the county commissioners' districts, the judicially created reapportionment plan set forth in the December 3, 1979 Order will not be imposed. On remand the district court is at present determining whether or not to implement the County Commission's December 22, 1981 reapportionment plan, appellees' proposed plan or the court's proposed plan.

APPENDIX A

Decision on Rehearing of the Fifth Circuit in *McMillan v. Escambia County, Florida*, 688 F.2d 960 (5th Cir. 1982).

Henry T. McMILLAN et al.,
Plaintiff-Appellees,

v.

ESCAMBIA COUNTY, FLORIDA et al.,
Defendants-Appellants.

Nos. 78-3507, 80-5011.

United States Court of Appeals,
Fifth Circuit.*

Sept. 24, 1982.

Paula G. Drummond, Pensacola, Fla., for Escambia County.

Rhyne & Rhyne, Charles S. Rhyne, William S. Rhyne, Washington, D.C., for all defendants-appellants.

Don J. Canton, City Atty., Pensacola, Fla; for City of Pensacola.

Crawford, Blacksher, Figures & Brown, J.U. Blacksher, Larry Menefee, Mobile, Ala., Kent Spriggs,Tallahassee, Fla., Eric Schnapper, New York City, Edward Still, Birmingham, Ala., for plaintiffs-appellees.

Appeals from the United States District Court for the Northern District of Florida.

*Former Fifth Circuit case, Section 9(1) of Public Law 96-452 – October 14, 1980.

Before COLEMAN, PECK** and KRAVITCH, Circuit Judges.

ON PETITIONS FOR REHEARING

KRAVITCH, Circuit Judge:

Plaintiffs filed this class action in March 1977 challenging the at-large systems for electing Escambia's County Commissioners and School Board members. The case was consolidated with another class action suit challenging the election scheme for the Pensacola City Council. The district court held all three systems unconstitutional, and defendants in each case appealed. We affirmed the district court's decision as to the School Board and City Council, but reversed its holding as to the County Commission. *McMillan v. Escambia County,* 638 F.2d 1239 (5th Cir. 1981) (appeal on merits); *McMillan v. Escambia County,* 638 F.2d 1249 (5th Cir. 1981) (appeal on remedy); *Jenkins v. Pensacola,* 638 F.2d 1249 (5th Cir. 1981) (appeal on remedy). Plaintiffs sought rehearing of our decision as to the County Commission.[1] We reserved ruling on the petition for rehearing pending the United States Supreme Court's decision in a case raising similar issues. That case has now been decided. *See Rogers v. Lodge,* ____ U.S. ____, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982). Having reviewed the Supreme Court's opinion in *Lodge,* we con-

**Honorable John W. Peck, U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

[1]Neither the School Board nor the City Council sought rehearing. Instead those defendants, jointly with the plaintiffs, filed motions requesting issuance of the mandates, which we granted. Hence the constitutionality of the election systems for the School Board and City Council is not before us. (The City of Pensacola filed a petition for writ of certiorari to the Supreme Court. That petition, however, was subsequently dismissed on the City's own motion. *See City of Pensacola v. Jenkins,* 453 U.S. 946, 102 S.Ct. 17, 69 L.Ed.2d 1033 (1981).

clude that the standards it sets forth compel reversal of our prior decision. We therefore grant plaintiffs-appellees' motion for rehearing, vacate the portion of our original opinion concerning the County Commission, No. 78-3507, 638 F.2d 1239, vacate opinion No. 80-5011, 638 F.2d 1249, and substitute the following.

I.

Background

The five members of Escambia County's governing body, the Board of County Commissioners, are elected for staggered four-year terms in accordance with an at-large voting system. Under this system candidates run for numbered places corresponding to the districts in which they live, but each must be elected by the voters of the entire county. There is no majority-vote requirement for the general election, although candidates must obtain a majority of the votes cast in the party primaries to win party nomination.

As of the date of trial, four blacks had run for the County Commission, none of whom had been elected. Plaintiffs, representing black citizens of Escambia County, brought this action claiming that the county's at-large election scheme unconstitutionally[2] dilutes their votes.

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[2]Plaintiffs sought relief under the first, thirteenth, fourteenth, and fifteenth amendments to the Constitution, the Civil Rights Act of 1957, 42 U.S.C. § 1971(a)(1), the Voting Rights Act of 1965, *as amended in* 1975, 42 U.S.C. § 1973, and the Civil Rights Act of 1871, 42 U.S.C. § 1983. The district court held that the at-large system violated plaintiffs' rights under the fourteenth and fifteenth amendments and the Voting Rights Act of 1965, 42 U.S.C. § 1973, which was enacted to carry out the purpose of the fifteenth amendment. It rejected plaintiffs' § 1971(a)(1) claim because that statute "concerns

The district court found that blacks comprised seventeen percent of the registered voters in Escambia County and that in elections in which black candidates had run for the County Commission there had been a consistent pat-

itself only with entitlement to cast one's vote at elections, and such is not presented in this voting dilution suit." *McMillan v. Escambia County*, PCA No. 77-0432, slip op. at 34 (N.D. Fla. July 10, 1978). The court did not address plaintiffs' claims based on the first and thirteenth amendments.

The defendants appealed the district court's holdings under the fourteenth and fifteenth amendments and the Voting Rights Act. Having the benefit of the Supreme Court decision in *Mobile v. Bolden*, 446 U.S. 55, 110 S.Ct. 1490, 64 L.Ed.2d 47 (1980), *see* text *infra* at 4-5, we rejected plaintiffs' fifteenth amendment and Voting Rights Act claims in accordance with the *Bolden* plurality's view that vote-dilution claims are cognizable only under the fourteenth amendment. *McMillan v. Escambia County*, 638 F.2d at 1242-43 nn.8-9. The *Lodge* decision expresses no view on the applicability of the fifteenth amendment and Voting Rights Act to claims of this type, *Rogers v. Lodge*; ____U.S. at ____ n. 6, 102 S.Ct. at 3276 n. 6, and hence provides no basis for departing from the *Bolden* plurality's analysis. Congress' recent amendment to Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, encompasses a broader range of impediments to minorities' participation in the political process than those to which the *Bolden* plurality suggested the original provision was limited. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 97th Cong., 2d Sess. (1982) (to be codified at 42 U.S.C. § 1973), *reprinted in* 51 U.S.L.W. 2 (1982); *see* S. Rep. No. 417, 97th Cong., 2d Sess. 2, 16, 28 & 30 n. 120 (1982), U.S. Code Cong. & Admin. News 1982, p. ____. The amendment also eliminates the requirement that plaintiffs demonstrate purposeful discrimination in the enactment or maintenance of the challenged voting system or practice. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205 § 3; S. Rep. No. 417, 97th Cong., 2d Sess. 2, 16 & 27-30. Appellees argue in their supplemental brief that we should reverse our prior decision and affirm the district court's holding that they are entitled to relief under the fifteenth amendment and the Voting Rights Act, as amended. While appellees have provided support for the proposition that the the amendment was intended to apply to pending litigation, *see* 128 Cong. Rec. H3841 (daily ed. June 23, 1982) (remarks of Rep. Sensenbrenner); *id.* at S7095 (daily ed. June 17, 1982) (remarks of Sen. Kennedy), and have presented a cogent argument that the amended Act

tern of racially polarized voting. The court found that the at-large system, coupled with the above factors, prevented black candidates from attaining a majority of the votes in the County Commission elections.[3] Having found that the at-large system had such discriminatory effect, the district court considered whether its purpose was

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entitles them to relief, we decline to address the fifteenth amendment and Voting Rights Act issues for the following reason. As a result of this litigation, elections for the Escambia County Commission have not been held since 1978. Pursuant to a stay of elections entered by this court in 1980, the elections schedules for that year and for 1982 were cancelled. Because the term of office for Escambia County Commissioner is four years, as of November 1982, none of the acting Commissioners will be serving pursuant to democratic election. Appellees have moved this court to dissolve the stay of elections so that "normal democratic processes" may proceed in Escambia County. Although appellees have briefed the fifteenth amendment and Voting Rights Act issues and discussed the effect of the 1982 amendment on this case, appellants have not yet been afforded opportunity to respond to appellees' argument. Accordingly, we could not render a decision on such issues without taking additional time to allow appellants to respond and possibly to schedule oral argument on these questions of first impression. *See* Rules 23(b), 24(a), Interim Rules of the United States Court of Appeals for the Eleventh Circuit, 28 U.S.C.A. (West Supp. 1982). Resolution of these issues could result in further delay and disruption of the electoral process in Escambia County. Moreover, our decision of these issues would not affect the outcome of this case because we hold, *infra*, that appellees are entitled to relief on their fourteenth amendment claim. Hence, we defer resolution of the Voting Rights Act and fifteenth amendment issues until a later day. The text of this opinion will be devoted to discussing the effect of *Lodge* on the fourteenth-amendment standards governing vote-dilution claims and the applicability of such standards to this case. *See McIntosh County Branch of the NAACP v. City of Darien*, 605 F.2d 753, 756 n.1 (5th Cir. 1980).

[3]Although there is no majority vote requirement for the general election, there is such a provision for the primary election. Moreover, the district court found that "as a practical matter, no one has in recent history won a general election without a majority." *McMillan v. Escambia County*, PCA No. 77-0432, slip op. at 18 (N.D. Fla. July 10, 1979).

discriminatory. Although the court found that the at-large system had not been enacted for a discriminatory purpose,[4] it concluded that the scheme had been maintained for such a purpose. In finding intentional discrimination, the court relied on a variety of factors, including the adverse effects of past discrimination by the state and county governments on blacks' exercise of their suffrage rights and participation in the political system, the unresponsiveness of elected County Commissioners to some needs of black citizens,[5] the depressed socio-economic status of blacks in the county, the tenuousness of the state policy behind the at-large system, and other features of the election system that enhanced its discriminatory effect. In addition to the above circumstantial or *Zimmer* evidence,[6] the district court found that the

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[4]The at-large requirements of the general and primary elections for the County Commission are based on a 1901 amendment to the Florida Constitution. Fla. Const., art. 8, § 5. The district court found that the historical background of the amendment suggested racial motivation. Nonetheless, the court declined to find that such system was enacted for a discriminatory purpose because a prior decision of the Fifth Circuit had determined that there was no racial motivation behind the amendment and because the plaintiff's own expert had substantiated this view.

[5]Although the court found that the elected commissioners had generally been responsive to the needs of black citizens, it noted a lack of responsiveness in two areas. *See* note 16 *infra*.

[6]In *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd sub nom. East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1975) (per curiam), the former Fifth Circuit set forth a list of factors relevant to the determination whether multimember or at-large districting schemes are "rooted in racial discrimination." *Id.* at 1305. The factors mentioned by the court were:

> lack of access [by the minority] to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, [ ] that the existence of past discrimination in general

County Commissioners' refusal to submit to voters a proposed referendum that would change the election system from at-large to single-member districts further supported a finding that the at-large system was being maintained for a discriminatory purpose.

The district court decided this case prior to the Supreme Court's decision in *Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980). The district judge, however, apparently anticipated the holding of *Bolden* that discriminatory purpose is a required element of a vote-dilution claim under the fourteenth amendment.[7] He

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> precludes the effective participation in the election system,. . . the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts.

Id.

[7]At the time the district court was considering this case, the Supreme Court had decided two cases that foreshadowed the holding in *Bolden* that discriminatory intent is a required element of an equal protection based vote-dilution claim. In *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), the Court held that a showing of disproportionate impact was not alone sufficient to support a claim of discrimination in employment under the fifth amendment. Instead, it held that discriminatory purpose is a required element of equal protection claims. In *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) the Court applied the discriminatory intent requirement to a fourteenth amendment claim of racially discriminatory zoning. Language in both opinions suggested the intent requirement is applicable to other types of equal protection claims. *See Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. at 265, 97 S.Ct. at 563; *Washington v. Davis*, 426 U.S. at 239-41, 244-45, 96 S.Ct. at 2047-48, 2049-50. The district court relied on *Arlington Heights* and on the former Fifth Circuit decision in *Nevett v. Sides*, 571 F.2d 209 (1978), in holding that the plaintiffs were required to show discriminatory purpose as well as discriminatory impact. *McMillan v. Escambia County*, PCA No. 77-0432, slip op. at 22-23 (N.D. Fla. July 10, 1978).

therefore rendered findings on the issue of discriminatory purpose, which we found sufficiently explicit to preclude the necessity for a remand in light of *Bolden*. Instead of remanding the case for further findings, we reviewed the district court's findings to determine whether they reflected enough evidence of discriminatory purpose to meet the standard set forth in *Bolden*. Concluding that the district court's subsidiary findings were not adequate to support its ultimate finding of intent under the *Bolden* standard, we reversed the decision of the district court.

In *Bolden*, the Supreme Court reversed a decision of the former Fifth Circuit that had invalidated an at-large election system as unconstitutionally diluting blacks' voting power. The *Bolden* Court explicitly held that discriminatory purpose was a required element of a vote-dilution claim brought under the fourteenth amendment[8] and reversed the lower court decision on the ground that there was inadequate evidence that the election system had been enacted or maintained for a discriminatory purpose. No view by any of the Justices in *Bolden* commanded a majority. Hence in interpreting that decision to determine its effect on this case, we looked to the opinions of the plurality and concurring Justices and attempted to discern "the view with which a majority of the Court could agree." *McMillan v. Escambia County*, 638 F.2d at 1243.

At least five Justices agreed in *Bolden* that "discriminatory purpose of some sort must be proven" in vote-dilution cases. *Id.* Those Justices split on the stan-

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[8] *See* note 7 *supra*.

dard of proof for intent, however.[9] In view of the divergence between the Justices, we adopted Justice Stewart's opinion, which commanded the greatest number of votes. *See id.* Accordingly, we followed the plurality's directive that the *Zimmer* factors, which the Fifth Circuit had previously established as indicia of unconstitutional vote-dilution, *see* note 6 *supra,* are insufficient, standing alone, to support a finding of discriminatory purpose. *See Mobile v. Bolden,* 446 U.S. at 173, 100 S.Ct. at 1503 (plurality opinion).[10]

As noted above, the district court based its finding of intent mainly on *Zimmer* factors although it also considered the County Commissioners' refusal to submit to the electorate a proposal to change the election system to a single-member district scheme. We interpreted *Bolden* as holding that the *Zimmer* criteria could not adequately support a finding of intentional discrimination and therefore focused on the latter evidence cited by the district court in reviewing its finding of intent. After examining the record, we concluded the Commissioners' actions in rejecting the

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[9]*Compare Mobile v. Bolden,* 446 U.S. at 71-74, 100 S.Ct. at 1502-1503 (plurality opinion) *with id.* at 90-92, 100 S.Ct. at 1512-13 (Stevens, J. concurring in result). *See also id* at 80, 100 S.Ct. at 1507 (Blackmun, J., concurring in result); *id.* at 101-03, 100 S.Ct. at 1517-18 (White, J., dissenting).

[10]The plurality interpreted *Zimmer* as setting forth criteria relevant only to discriminatory *impact* and as holding that such impact was alone sufficient to establish an unconstitutional election system. *See Mobile v. Bolden,* 446 U.S. at 71, 100 S.Ct. at 1502 (plurality opinion). Justice White, who was of the view that sufficient evidence of discriminatory intent was present in *Bolden,* pointed out that the factors articulated in *Zimmer* were derived from prior Supreme Court vote-dilution cases and had been considered as circumstantial evidence of discriminatory purpose. *Id.* at 101, 100 S.Ct. at 1517 (White, J., dissenting).

proposed referendum provided insufficient evidence of intent to discriminate against blacks. We noted that the district court was entitled to discredit the Commissioners' testimony that there was no racial motivation behind their action but held that "disbelief of that testimony is not sufficient to support a contrary finding." *McMillan v. Escambia County,* 638 F.2d at 1245. Because the only other evidence of intent consisted of *Zimmer* factors, we reversed the district court's finding that the county election scheme was being maintained for a discriminatory purpose.

II.

Effect of Rogers v. Lodge *on Our Decision That Plaintiffs Failed to Establish Unconstitutionality of Escambia County Commission Election System*

As we noted in our prior opinion, the *Bolden* Court's divergent analyses on the intentional discrimination issue left us somewhat "adrift on uncharted seas with respect to how to proceed." *Id.* at 1242 (quoting *Mobile v. Bolden,* 446 U.S. at 103, 100 S.Ct. at 1518 (White, J., dissenting)). In the more recent decision of *Rogers v. Lodge,* ____ U.S. ____, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982), the Supreme Court substantially clarified the constitutional standard governing vote-dilution claims. The *Lodge* opinion, which garnered a majority of the Justices,[11] reaffirmed the holding of *Bolden* that evidence of purposeful discrimination is required to sustain an equal protection

[11]The *Lodge* majority comprised the three Justices who dissented in *Bolden* (Justices White, Brennan, and Marshall), Justice O'Connor, who joined the Court after *Bolden* was decided, and Chief Justice Burger, who voted with the plurality in *Bolden.*

challenge to an election system. *Id.* at ____, 102 S.Ct. at 3275. The majority's analysis of the standard governing the type and amount of evidence necessary to show discriminatory intent, however, reflects both a more favorable view of the *Zimmer* factors and a greater deference to the finding of the district court than the analysis of the *Bolden* plurality.

Although the district court in *Lodge* had relied primarily on the *Zimmer* factors in finding purposeful discrimination, the Supreme Court rejected the argument that the decision was infirm under *Bolden*. Rather, the Court held that the district court had applied the proper legal standard. It noted that the district court's decision had been "rendered a considerable time after *Washington v. Davis* and *Arlington Heights*" and that "the trial judge also had the benefit of *Nevett v. Sides*," 571 F.2d 209 (5th Cir. 1978), which applied the discriminatory intent standard of the above cases to a vote-dilution claim (*see* note 6 *supra*). *Rogers v. Lodge*, ____ U.S. at ____, 102 S.Ct. at 3276. Moreover, the district court had explicitly recognized the discriminatory intent requirement and had been aware that *Zimmer* factors were not exclusive or absolute but simply "were relevant to the question of discriminatory intent." *Id.* The Court also declined to "disturb the District Court's finding that the at-large system in Burke County was being maintained for the invidious purpose of diluting the voting strength of the black population." *Id.* at ____, 102 S.Ct. at 3278. The Court's opinion requires appellate courts to defer to district courts' factual findings on intent because such findings "represent[ ] . . . a blend of history and an intensely local appraisal of the design and impact of the [election system at issue] in light of past and present reality, political and otherwise." *Id.* at ____-____, 102 S.Ct. at 3278 (quoting *White v. Regester*, 412 U.S. 755,

769-70, 93 S.Ct. 2332, 2341, 37 L.Ed.2d 314 (1973)). The Court thus applied the clearly erroneous standard of Fed. R. Civ. P. 52 to the district court's finding of discriminatory intent. *Id.* (citing *Pullman-Standard v. Swint*, ____ U.S. ____, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982) (applying Rule 52 to finding of intent in employment discrimination suit)).

A. *Did Court Below Apply Correct Constitutional Standard?*

[1] Applying the analysis adopted by the *Lodge* majority to this case, we consider first whether the district court applied the proper fourteenth amendment standard to appellee's vote-dilution claim. As we noted in our original opinion, *McMillan v. Escambia County*, 638 F.2d at 1243, "the district court below correctly anticipated that the *Arlington Heights* requirement of purposeful discrimination must be met." Indeed, the district court expressly recognized that

> [a]n at-large election system which operates to dilute the vote of black citizens is not necessarily violative of the Constitution. It must also be shown that discriminatory intent was a motivating factor in the enactment of the system or is a motivation in the present maintenance of the system.

McMillan v. Escambia County, PCA No. 77-0432, slip op. at 22-23 (N.D. Fla. July 10, 1978). As in *Lodge*, the district court in this case had the benefit of *Nevett v. Sides*, *supra*. The court below relied on *Nevett* in holding that "[i]nvidious purposes in the maintenance of the system are proved by the circumstances surrounding the operation of the system and may be inferred from findings under the

Zimmer factors." *McMillan v. Escambia County,* PCA No. 77-0432, slip op. at 23 (N.D. Fla. July 10, 1978) (citing *Nevett v. Sides,* 571 F.2d at 222). The district court's consideration of the Commissioners' response to the single-member district proposal of the charter committees indicates that the court did not view the *Zimmer* factors as the exclusive criteria for determining discriminatory purpose. Rather, the court inferred from the Commissioners' action, together with the aggregate of the findings under the *Zimmer* factors, that the at-large system was being maintained for invidious purposes. *See McMillan v. Escambia County,* PCA No. 77-0432, slip op. at 19, 21 & n. 6, 29-31 (N.D. Fla. July 10, 1978). *Compare id. with Rogers v. Lodge,* ____ U.S. at ____, 102 S.Ct. at 3276, 3279-80. The district court's heavy reliance on *Zimmer* criteria as circumstantial evidence of intent to discriminate, while at odds with our interpretation of the standard for proving intent under *Bolden, see* text *supra* at 4-5, is fully consistent with the analysis adopted by a majority of the Supreme Court in *Lodge.* Hence, we conclude the court below applied the correct legal standard to this case.

B. *Was District Court's Finding of Intentional Discrimination Clearly Erroneous?*

[2] In light of the *Lodge* Court's reaffirmation of the validity of the *Zimmer* criteria as circumstantial evidence of intent, we now conclude that the district court's finding of intent in this case – though based largely on the *Zimmer* factors – was not clearly erroneous.

The district court found that blacks constitute twenty percent of the population and seventeen percent of the registered voters of Escambia County. Although black

citizens had run for County Commission on four occasions, no black candidate had ever won an election. None of the blacks who ran was able to obtain the majority of votes necessary to win the Democratic primary. The court found that in each of the races in which a black candidate ran for County Commission the voting had been severely polarized along racial lines.[12] In other words, "whenever a black challenges a white for countywide office, a consistent majority of the whites who vote will consistently vote for the black's opponent.[13] The court found that the numerical minority of blacks coupled with the white bloc vote prevented blacks from attaining a majority of votes in the county. Although the Supreme Court has consistently maintained that racially polarized voting and inability of a minority group to obtain legislative seats in proportion to its voting potential are not alone sufficient to prove that a multimember or at-large districting scheme is being used invidiously to minimize the voting strength of the minority

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[12]The R^2 coefficient, which reflects the percentage of variation in the vote attributable to the race of the registered voters in the races in which black candidates ran, ranged from .85 to .98. *McMillan v. Escambia County*, PCA No. 77-0432, Appendix A (N.D. Fla. July 10, 1978). The district court's findings concerning racially polarized voting in Escambia County elections are set forth in full in our original opinion. *McMillan v. Escambia County*, 638 F.2d at 1241-42 n.6.

[13]The district court noted that in the one countywide election in which a black candidate ran unopposed in the Democratic primary, that candidate lost the general election to a white Republican candidate. That election, which was a race for a position on the County School Board, was the first "in the modern history of Escambia County [in which] a Republican had won any countywide office." *McMillan v. Escambia County*, PCA No. 77-0432, slip op. at 11 (N.D. Fla. July 10, 1978). Moreover, the Republican candidate received 22,523 votes despite a total Republican registration in the County of only 7,268; whereas in a prior election in which the same Republican had run against a white Democrat, he had received only 10,721 votes.

group, *e.g.*, *Rogers v. Lodge*, ____ U.S. at ____, 102 S.Ct. at 3279; *White v. Regester*, 412 U.S. 755, 765-66, 93 S.Ct. 2332, 2339-40, 37 L.Ed.2d 314 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 149-50, 91 S.Ct. 1858, 1872, 29 L.Ed.2d 363 (1971), it has recognized that such facts "bear heavily on the issue of purposeful discrimination." *Rogers v. Lodge*, ____ U.S. at ____, 102 S.Ct. at 3279.[14]

[14]As the Court stated:

> Voting along racial lines allows those elected to ignore black interests without fear of political consequences, and without bloc voting the minority candidates would not lose elections solely because of their race. Because it is sensible to expect that at least some blacks would have been elected in Burke County, the fact that none have ever been elected is important evidence of purposeful exclusion.

Rogers v. Lodge, ____U.S. at____, 102 S.Ct. at 3279.

Appellants argue that the facts in this case distinguish it from *Lodge* because blacks comprise only 23% of the population and 17% of the registered voters in Escambia County, whereas they made up a majority of the population and 38% of the registered voters in Burke County. Appellants contend that the Supreme Court's assessment in *Lodge* that some blacks likely would have been elected in Burke County had the voting not occurred along racial lines does not hold true in Escambia County, where blacks constitute only a minority of the county's voting population. Appellants misunderstand the question at issue, however. The Supreme Court's premise is that "without bloc voting the minority candidates would not lose elections solely because of their race." *Id.* Not accounting for other variables, elections would be expected to produce a ratio of successful black and white candidates corresponding roughly to the respective percentages of the population comprised by each race. Under this analysis, blacks should have attained office in roughly 40% of the elections in Burke County, whereas in Escambia County the projection would be closer to 20%. Of course, this analysis omits many factors other than race that could result in a lower proportion of successful black candidates. Certainly some degree of deviation from proportionality to population would neither be unusual nor indicative of intentional discrimination in the election system. Here, as in *Lodge* however, the deviation is substantial; no black has ever served as Commissioner in Escambia County. Although the number of blacks that reasonably could be expected to

As in *Lodge*, the district court below also considered the impact of past discrimination on the ability of blacks to participate in the political process. It found that the County Commission and School Board election systems "had their genesis in the midst of a concerted state effort to institutionalize white supremacy." *McMillan v. Escambia County*, PCA No. 77-0432, slip op. at 4 (N.D. Fla. July 10, 1978). Prior to 1901, County Commissioners were appointed by the governor, and the court found that "appointment was favored over election to ensure against the possibility that blacks might be elected in majority black counties." *Id.* In 1889, Florida instituted a poll tax to disenfranchise blacks. The court found that although the tax was of limited success, "enough blacks were disenfranchised to permit the state to allow at-large election of county commissioners." *Id.* at 5. The court found that enactment of Jim Crow laws and exclusion of blacks from the Democratic Party, beginning in 1900, further impeded black participation in the electoral process. In 1907, Florida enacted a law providing for primary elections of County Commissioners in which candidates were elected from single-member districts. 1907 Fla. Laws, ch. 5697, § 1. The district court found that the anomaly between the

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hold office in Escambia County elections is smaller than that in Burke County, it is as sensible in this case as it was in *Lodge* to expect that "at least some blacks would have been elected" absent racially polarized voting.

Finally, we emphasize our understanding of the limited role of evidence of racially polarized voting and lack of success by minority candidates. Such facts are reflective of the dilutive effect of an election system and, circumstantially, of intent to cause that effect. They are "insufficient in themselves to prove purposeful discrimination," however, "absent other evidence such as proof that blacks have less opportunity to participate in the political processes and to elect candidates of their choice." *Id.*

white, districted primary elections and the at-large general elections uniquely disadvantaged blacks: "Since blacks could not vote in the Democratic Primary district elections, they were forced to challenge white Democratic nominees in at-large elections in which blacks had no voter majorities. In effect, the white primary was the election." *McMillan v. Escambia County,* PCA No. 77-0432, slip op. at 5 (N.D. Fla. July 10, 1978). The Florida Supreme Court invalidated this dual system in 1945, and at-large voting was instituted in the primaries several years later.

The district court found that there are no longer any slating organizations that prevent blacks from participating in the election of County Commissioners nor direct impediments to blacks' registration and voting. The court found "no significant difference" currently existing between black and white voter registration. *Id.* at 6. Nonetheless, it concluded that "other barriers . . . effectively operate to preclude access for blacks." The court cited the consistent inability of blacks to win elections and a $1000 filing fee required of candidates for County Commission as factors that had discouraged blacks from running, with the result that the number of blacks seeking countywide office in recent years was "far lower than one would expect based on their percentage of the population." *Id.* at 10. Indeed, the court found that because of these impediments no blacks had run for County Commission since 1970. *Id.*

As additional evidence of exclusion of blacks from the political process, the district court noted that state-enforced segregation has created two separate societies in Escambia County. Churches, clubs, neighborhoods, and until recently, schools in the county have remained segregated by race. The court found that this "continued

separation [of blacks] from the dominant white society" not only has "left blacks in an inferior social and economic position, with generally inferior education," but has also "helped reduce black voting strength and participation in government." *Id.* at 17. Specifically, the court found that the segregation of black and white citizens had helped create bloc voting and resulted in white candidates' failure to arouse interest among blacks[15] and in city and county governing bodies' failure to appoint blacks to governmental advisory committees and boards.[16]

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[15]The court found that black voters have shown a consistent, nearly unanimous preference for black candidates in races in which blacks have run. *McMillan v. Escambia County*, PCA No. 77-0432, slip op. at 13, 20-22 (N.D. Fla. July 10, 1978). Although white candidates actively seek the votes of blacks, studies of voter turnouts indicated that when whites run against whites black voter turnout is significantly lower than when black candidates run for office. *Id.* at 13 & n. 4, 15. These facts indicate that "blacks view the choice of white candidates as irrelevant to their interests." *Id.* at 15.

[16]Although the court found that the commissioners had generally been responsive to the interests of black citizens, it noted two areas in which they had not. It found that "[t]he commissioners have failed to appoint any more than a token number of blacks to its committees and boards. The black population representing 20% of the county is thus served by an all-white board of commissioners which depends on virtually (95%) all-white advisory panels." *McMillan v. Escambia County*, PCA No. 77-0432, slip op. at 15 (N.D. Fla. July 10, 1978). The court found the "severe underrepresent[ation]" of blacks on county committees "has independent significance because of the absence of or near absence of blacks in elected positions. With such a paucity of black elected and appointed representatives, blacks are excluded from all positions of responsibility in the governmental policymaking machinery." *Id.* at 21. The court noted the former city mayor's explanation of this failure as resulting from the relative nonvisibility to him of black citizens as compared with whites. A former city council member had referred to the black and white communities as the "black and white 'sides of the fence.' " *Id.* at 17.

Appellants argue that this case is distinguishable from *Lodge* because the district court in *Lodge* found extensive evidence of unresponsiveness by elected officials to the needs of blacks whereas

The district court found the policy behind the at-large system for electing County Commissioners tenuous. It noted that although the at-large system had been in effect for the general election since 1901, during most of that period a single-district system was employed in the Democratic primaries, which were then tantamount to election.[17] Hence despite the state constitutional requirement of at-large elections, the effect of this dual election system was "to ensure that commissioners were elected

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here the court found, with the above-noted exceptions, that the Escambia County Commissioners had generally been responsive to the needs of black citizens. *Compare Rogers v. Lodge*, ___U.S. at ___, 102 S.Ct. at 3279, *with McMillan v. Escambia County*, PCA No. 77-0432, slip op. at 15 (N.D. Fla. July 10, 1978). Moreover, appellants argue that the district court's finding that white candidates in Escambia County actively seek the votes of black citizens precludes a finding of discriminatory intent. We addressed these arguments in our original opinion, *McMillan v. Escambia County*, 638 F.2d at 1248-49, and concluded that once discriminatory intent has been shown responsiveness is irrelevant. The Fifth Circuit panel in the *Lodge* case subsequently reached the opposite conclusion, holding that proof of unresponsiveness is an essential element of a fourteenth amendment vote-dilution claim. *Lodge v. Buxton*, 639 F.2d 1358, 1374-75 (5th Cir. 1981). The Supreme Court resolved the issue in its opinion in *Lodge*. It held that unresponsiveness, while an important factor to be considered in determining whether discriminatory purpose may be inferred, is not essential to prove such purpose. *Rogers v. Lodge*, ___ U.S. at ___ n. 9, 102 S.Ct. at 3280 n. 9. In view of the Supreme Court's holding, we do not consider the district court's finding that Escambia County Commissioners were responsive to black citizens' needs in most areas conclusive on the question of discriminatory intent.

[17]The Florida Supreme Court invalidated the white primary in 1945. *Davis v. State ex rel. Cromwell*, 156 Fla. 181, 23 So.2d 85 (1945). County commissioners continued to be nominated through single-member district primaries until 1954, when the Florida court held that the anomaly between the single-member district primaries and the at-large general election violated the state constitution. *Ervin v. Richardson*, 70 So.2d 585 (Fla. 1954).

from single-member districts." *Id.* at 24.[18] Several County Commissioners explained the policy behind maintaining the at-large system as rooted in the belief that such system made each Commissioner responsive to the needs of the whole community rather than to a particular district. The district court found this explanation inconsistent with the present operation of the Commission, however. In particular, the court noted that "the residence district of each commissioner is more or less regarded as the district of that commissioner for which he has responsibility and for whose needs he is the particular advocate on the commission." *Id.* at 30.[19]

Finally, the district court considered the so-called "enhancing factors" that the courts have recognized as increasing the tendency of a multimember or at-large elec-

[18]The court found evidence indicating racial motivation behind the 1901 amendment establishing the present at-large system, but declined to depart from the finding in a prior case that the amendment was not enacted for discriminatory purposes. *See McGill v. Gadsden County,* 535 F.2d 277 (5th Cir. 1976).

[19]Appellants asserted in the trial court that the Commissioners' rejection of the single-member district proposal reflected a desire to maintain their own incumbency. We stated in our original opinion that a motive to exclude all other potential candidates could not, absent other evidence, be equated with a desire to exclude blacks in particular. *See McMillan v. Escambia County,* 638 F.2d at 1245. Of course, neither can incumbent legislators' desire to remain in office justify or legitimate an election scheme that is purposefully discriminatory. *Cf. Rogers v. Lodge,* ____ U.S. at ____, 102 S.Ct. at 3287 (Stevens, J., concurring) (features of election system that dilute minority voting power are invalid if only purpose they serve is to perpetuate power of entrenched majority). In reversing our prior decision and affirming the district court's finding of intent we do not depart from our prior conclusion that desire to maintain incumbency does not equal racially discriminatory intent. Our affirmance simply reflects consideration of a broader range of evidence than we previously understood could be used to support a finding of discriminatory purpose. *See* text *supra* at 963-965.

tion system to dilute blacks' voting strength. *See Rogers v. Lodge,* ____ U.S. at ____, 102 S.Ct. 3281; *Zimmer v. McKeithen,* 485 F.2d at 1305. The lower court found that the large population and geographical size of the county, the majority-vote requirement for the primary election, and the requirement that candidates run for numbered places[20] enhanced "the problems faced by blacks seeking access to the political processes." *McMillan v. Escambia County,* PCA No. 77-0432, slip op. a 18, 19 (N.D. Fla. July 10, 1978).

On the basis of the above findings, the district court concluded:

> To this court the reasonable inference to be drawn from [the Commissioners'] actions in retaining at-large districts is that they were motivated, at least in part, by the possibility single district elections might result in one or more of them being displaced in subsequent elections by blacks.
>
> This conclusion is bolstered by the findings under the *Zimmer* factors that black voting preferences for blacks cannot be registered in the present system and black candidates are otherwise denied access to that system.

Id. at 31. The evidence in the record fully supports the district court's subsidiary findings. The court relied on the aggregate of these findings involving *Zimmer* factors and other evidence in determining that the at-large system in

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[20]The court found that this requirement had the effect "that blacks are always pitted in head-on-head races with white candidates, and that the black community cannot concentrate its votes in a large field of candidates." *McMillan v. Escambia County,* PCA No. 77-0432, slip op. at 18 (N.D. Fla. July 10, 1978).

Escambia County is being maintained for discriminatory purposes. Applying the standard enunciated by the Supreme Court in *Lodge*, we cannot say the district court's finding of intent was clearly erroneous.

III.

Validity of Remedy Prescribed by District Court

Having invalidated the election system for the Escambia County Commission, the district judge ordered the parties to submit proposals for a remedy to rectify the constitutional defect. The defendant-County Commissioners submitted a plan, which they had adopted by ordinance, providing for a mixed single-member district and at-large scheme.[21] A proposal for a new charter government under which Commissioners would be elected by a system similar to that proposed by defendant-Commissioners[22] was then pending submission to the voters of Escambia County in a referendum election. Defendants requested that the district court adopt this mixed system as the remedial plan of the court.

The Supreme Court cases addressing remedies for unconstitutional vote dilution have distinguished between judicially imposed and legislatively adopted plans. The

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[21]Defendants' proposal would establish a seven-member Board of County Commissioners with five Commissioners to be elected from single-member districts and two to be elected by the voters of the county at large.

[22]The difference between the Commissioners' proposal and the ballot proposition was that the former included an apportionment plan whereas the latter entrusted the establishment of district boundaries to a reapportionment commission.

Court has generally disapproved of multimember district and at-large election schemes as components of a judicially fashioned remedy and has admonished district courts to employ single-member districts. *Connor v. Finch,* 431 U.S. 407, 414-15, 97 S.Ct. 1828, 1833-34, 52 L.Ed.2d 465 (1977); *East Carroll Parish School Board v. Marshall,* 424 U.S. 636, 639, 96 S.Ct. 1083, 1085, 47 L.Ed.2d 296 (1976); *Connor v. Johnson,* 402 U.S. 690, 692, 91 S.Ct. 1760, 1762, 29 L.Ed.2d 268 (1971). *See also Rogers v. Lodge,* ____ U.S. ____, ____, 102 S.Ct. 3272, 3281, 73 L.Ed.2d 1012 (1982). In *Wise v. Lipscomb,* 437 U.S. 535, 98 S.Ct. 2493, 57 L.Ed.2d 411 (1978), however, the Court suggested that greater deference will be accorded to legislatively adopted reapportionment plans than to remedies devised by district courts. Legislative plans thus are not limited to the strict single-member district requirement that applies to judicial reapportionment. *Id.* at 540-41, 98 S.Ct. at 2497-98. *See Chapman v. Meier,* 420 U.S. 1, 18, 27, 95 S.Ct. 751, 761, 766, 42 L.Ed.2d 766 (1975).

Because the election scheme proposed by defendants was not a pure single-member district system, the district court addressed whether the proposal should be treated as a legislatively adopted or judicially imposed plan. The court found that the voters of Escambia County were authorized under the Florida Constitution to reapportion the county by referendum. Hence, it concluded that if the voters adopted the proposed new charter, the court should treat the reapportionment scheme as a legislatively adopted plan. The court held, however, that the Commission was without authority under state law to enact such a system, and that in the event the referendum was not passed by the voters of the county the Commission's ordinance adopting essentially the same apportionment system could not be treated as a legislatively adopted plan.

On November 6, 1979, the voters of Escambia County rejected the proposed charter government. Having determined that only the voters, and not the Commission, could enact a reapportionment scheme, the district court concluded that a judicially imposed plan was required. It held that

> [u]nder the authorities before the court, a judicially devised plan must require total use of single member districts unless persuasive justification to the contrary exists. No such persuasive justification is here established. Because of that, the plan heretofore submitted by the county commission of Escambia County must be disapproved by this court.

McMillan v. Escambia County, PCA No. 77-0432, slip op. at 3 (N.D. Fla. Sept. 24, 1979). The court adopted a plan reapportioning Escambia County into five single-member districts and providing for elections of all members of the County Commission in 1980.[23]

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[23]The plan adopted by the district court preserves the staggered terms feature of the current Commission by providing for three of the new Commissioners to serve four-year terms and two of the new Commissioners to serve two-year terms. Thereafter all Commissioners would be elected for four-year terms. The defendants objected to holding elections for all five Commission positions at once and requested that the single-member plan be "phased-in" by permitting two of the Commissioners then serving to remain in office until 1982 — the expiration period for their terms. Defendants' argued that such procedure would minimize the disruption resulting from turnover on the Commission and allow the two Commissioners whose terms were unexpired to serve the full period to which they were entitled to be in office. The district court rejected this proposal on the ground that "where a governing authority is found to be holding office by virtue of an election scheme which is constitutionally infirm, a court, under its equitable authority, should take steps to correct such defects at the earliest possible date." Moreover, the court found that leaving two at-

Defendants appealed from the district court's decision on the remedy. They argued that the Commission was not prohibited by state law from enacting a reapportionment scheme and that the Commission's proposal should be treated as a legislatively adopted plan irrespective of the voters' rejection of the measure in the referendum election. We initially reversed the district court's relief order because we had reversed its decision on the merits concerning the constitutionality of the Escambia County election system. *McMillan v. Escambia County*, 638 F.2d 1249 (5th Cir. 1981). Because we have reversed our own prior decision on the merits, we must now address the validity of the relief ordered by the district court. We agree with the district court's analysis of the remedy issue and accordingly affirm.

The district court based its determination that the Commission was unauthorized to enact a reapportionment scheme on the Florida Constitution. Article VIII, section 1 of the Florida Constitution provides for two types of county governments: (1) government established by charter, which may be adopted or amended "only upon vote of the electors of the county in a special election called for that purpose," Fla. Const. art. VIII, § 1(c); or (2) noncharter government consisting of a five-member board of commissioners elected at-large, *id.* § 1(e). The legislative powers of noncharter governments are expressly

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large Commissioners in office would temporarily give some citizens greater representation than others. We need not decide whether the district court abused its discretion in rejecting defendants' proposed "phased-in" version of the court's remedial plan. The passage of time since the district court rendered its decision has essentially eliminated the objections defendants raised; none of the Commissioners currently in office will be serving pursuant to his elected term by the time elections under the court's apportionment scheme are held.

limited to those "provided by general or special law," *id.* § 1(f), whereas charter governments "have all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors," *id.* § 1(g). The Escambia County Commission is a noncharter government, and thus its legislative powers encompass only those specifically provided by state law. Defendants cite no state law empowering the Commission to reapportion itself, but contend that, under the analysis of *Wise v. Lipscomb, supra,* the Commission is implicitly vested with power to reapportion when the existing apportionment scheme has been held unconstitutional. We reject this argument because we are of the view that the district court correctly distinguished this case from *Wise.*

In *Wise* the Dallas City Council adopted a reapportionment scheme with a combination of single-member and at-large districts in response to a declaratory judgment by a federal district court holding the existing at-large scheme unconstitutional. *Wise v. Lipscomb,* 437 U.S. at 538, 98 S.Ct. at 2496. The at-large system had been established by city charter, which under Texas law could be amended only by referendum. *Id.* at 544, 98 S.Ct. at 2499. Despite the absence of an express grant of legislative power to the City Council to change the election system, the Supreme Court upheld the system as a valid legislatively enacted plan. *Id.* at 539-46, 98 S.Ct. at 2496-2500 (White and Stewart, JJ.); *id.* at 547-49, 98 S.Ct. at 2500-01 (Powell, Blackmun, and Rehnquist, JJ. and Burger, C.J., concurring in part and concurring in the judgment). Although six members of the Court agreed that the plan was legislatively rather than judicially imposed, the Justices did not agree on the analysis leading to that conclusion. The opinion of Justice White, concurred in by Justice Stewart, indicates that only those election schemes adopted by a

governing body pursuant to its valid legislative powers will be treated as legislative plans. *Id.* at 544-46, 98 S.Ct. at 2499-500. Justices White and Stewart stated that the Dallas City Council plan met this requirement because "[a]lthough the Council itself had no power to change the at-large system as long as the Charter provision remained intact, once the Charter provision was declared unconstitutional, and in effect, null and void, the Council was free to exercise its legislative powers which it did by enacting the [combined at-large and single-member district] plan." *Id.* at 544, 98 S.Ct. at 2499. The opinion specifically notes, however, that "[t]he record suggests no statutory, state constitutional, or judicial prohibition upon the authority of the City Council to enact a municipal election plan under circumstances such as this and respondents have been unable to cite any support for its [sic] contention that the City Council exceeded its authority." *Id.* n. 8, 98 S.Ct. 2499 n. 8. Justices Powell, Blackmun, and Rehnquist and Chief Justice Burger declined to adopt the legislative powers analysis articulated by Justice White. Instead they viewed the "essential point" in distinguishing legislatively from judicially imposed plans "that the Dallas City Council exercised a legislative judgment, reflecting the policy choices of the elected representatives of the people, rather than the remedial directive of a federal court." *Id.* at 548, 98 S.Ct. at 2501 (Powell, Blackmun, and Rehnquist, JJ. and Burger, C.J., concurring in part and concurring in the judgment). In the view of these Justices, the "rule of deference to local legislative judgments remains in force even if, . . . our examination of state law suggests that the local body lacks authority to reapportion itself." *Id.* Justice Marshall, joined by Justices Brennan and Stevens, dissented. These Justices agreed with Justices White and Stewart that only election systems adopted by a govern-

mental body pursuant to its valid legislative authority should be treated as legislative plans. *Id.* at 550, 98 S.Ct. at 2502 (Marshall, Brennan, and Stevens, JJ., dissenting). The dissenting Justices were of the view, however, that the Dallas plan "was not devised by the City Council in the usual course of its legislative responsibilities" but was "proposed as less a matter of legislative judgment than as a response by a party litigant to the court's invitation to aid in devising a plan." *Id.* at 552, 98 S.Ct. at 2503.

[3] Because the analysis of Justices White and Stewart effectively controlled the outcome of the *Wise* case,[24] we adopt it as the governing standard for determining when an election system proposed in response to a finding of vote-dilution should be treated as a legislatively rather than judicially imposed plan.[25] Applying that analysis to this case, we conclude that the plan proposed by defendant-Escambia County Commissioners does not meet the requirements for a legislatively adopted plan. The facts here are similar to those in *Wise* in that the only

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[24]Justices White and Stewart adopted a standard for legislative plans that was more stringent than that stated by the other four concurring Justices, but less stringent than that articulated by the three dissenting Justices.

[25]In *Marshall v. Edwards*, 582 F.2d 927, 932-33 (5th Cir. 1978), Judge Wisdom extracted the major points from each of the three relevant opinions in *Wise* and considered all of them in deciding whether the plan at issue was court-ordered or legislative in nature. As we noted in a later case, the facts in *Marshall* indicated a court-ordered plan under any of the Justices' analyses. *Jenkins v. City of Pensacola*, 638 F.2d 1249, 1252 (5th Cir. 1981). In *Jenkins* we found that the considerations in the opinions of Justices White and Powell pointed in both directions, but concluded that "[o]n balance" the plan was "better viewed as a legislative plan." *Id.* In this case, however, we are presented with a fact situation that under Justice White's analysis points to a court-imposed plan, but under Justice Powell's analysis would be considered a legislative plan. Hence we are forced to decide which of the two approaches we should follow.

method authorized by state law for adopting a county election system that is not at-large is for the voters of the county to approve such a system by referendum. *See* text *supra* at 17. Unlike the Texas Constitution, however, the Florida Constitution expressly limits the legislative powers of the County Commission to those specifically authorized by state law. Hence, as the district court found, the Commission does not possess the legislative authority to reapportion itself even where the existing apportionment scheme has been held unconstitutional. On this ground, the district court correctly held that a judicially devised plan was necessary.

[4] Finally, we hold that the remedial plan adopted by the district court was fully within its discretion. *See East Carroll Parish School Board v. Marshall,* 424 U.S. 636, 638-40, 96 S.Ct. 1083, 1084-85, 47 L.Ed.2d 296 (1976). *Cf. Chapman v. Meier,* 420 U.S. 1, 26-27, 95 S.Ct. 751, 765-66, 42 L.Ed.2d 766(1975)(court-ordered plans held to higher standards than legislatively adopted plans); *Corder v. Kirksey,* 585 F.2d 708, 713-15 (5th Cir. 1978)(mixed scheme composed of both single-member districts and at-large seats required justification).

IV.

For the reasons stated above, we AFFIRM the district court's holding that the election system for the Escambia County Commission violates the fourteenth amendment. We also AFFIRM the remedial plan adopted by the court. In view of the passage of time since the district court issued its remedial order, we REMAND this case to the court below with instructions to revise the scheduling terms of its remedial order accordingly.

APPENDIX B

Related Decisions.

1. Decision of the Fifth Circuit in *McMillan v. Escambia County, Florida*, 638 F.2d 1239 (5th Cir. 1981).

Henry T. McMILLAN et al.,
Plaintiffs-Appellees,

v.

ESCAMBIA COUNTY, FLORIDA et al.,
Defendants-Appellants.

Elmer JENKINS et al.,
Plaintiffs-Appellees,

v.

CITY OF PENSACOLA et al.,
Defendants-Appellants.

No. 78-3507.

United States Court of Appeals,
Fifth Circuit.

Feb. 19, 1981.

Richard I. Lott, County Atty., John W. Flemming, Asst. County Atty., Pensacola, Fla., for Escambia County.

Ray, Patterson & Kievit, Pensacola, Fla., for School Board.

Charles S. Rhyne, William S. Rhyne, Washington, D.C., for all defendants-appellants.

Don J. Canton, City Atty., Pensacola, Fla., for City of Pensacola.

J.U. Blacksher, Larry Menefee, Mobile, Ala., Kent Spriggs, Tallahassee, Fla., Jack Greenberg, Eric Schnap-

per, New York City, Edward Still, Birmingham, Ala., for plaintiffs-appellees.

Appeals from the United States District Court for the Northern District of Florida.

Before COLEMAN, PECK* and KRAVITCH, Circuit Judges.

KRAVITCH, Circuit Judge:

These consolidated cases arise from an attack on the forms of government in the City of Pensacola and Escambia County, Florida. The County Commission, City Council and School Board are all defendants. The district court, after extensive hearings, found that the at-large election systems used to elect each of the three defendant bodies are unconstitutional.[1] We affirm in part and reverse in part.

*Senior Circuit Judge of the Sixth Circuit, sitting by designation.

[1]These appeals proceeded in a piecemeal manner. After the district court held the three defendant bodies to be unconstitutional, but before a remedy was ordered, the defendants filed a notice of appeal. The district judge had expresed his belief that his order finding the systems unconstitutional was a final order, but certified it for interlocutory review in case he was in error.

While that appeal (No. 78-3507) was pending but before it was set for oral argument, the district court entered its remedy order against the city council. The plaintiffs filed a notice of appeal from the remedy order which was docketed as 79-1633 and was consolidated with 78-3507 for oral argument. That appeal is being decided today in a separate opinion. *Jenkins v. City of Pensacola,* 638 F.2d 1249 (5th Cir. 1981).

After the district court entered its remedy order for the city council, it entered remedy orders against the county commission and the school board. The school board chose not to appeal the order entered against it, but the county commission did appeal the remedy order. That appeal, 80-5011, was consolidated with 78-3507 and 79-1633 for oral argument and is being decided today in a separate opinion. *McMillan v. Escambia County,* 638 F.2d 1249 (5th Cir. 1981).

I. *Overview of Plaintiffs' Claim*

These class actions were filed simultaneously on March 18, 1977, by black voters of Pensacola and Escambia County. The plaintiffs alleged that the at-large systems for electing members of the area's three major governing bodies are unconstitutional as violative of their rights under the First, Thirteenth, Fourteenth and Fifteenth Amendments and are in violation of the Civil Rights Act of 1957, 42 U.S.C. § 1971(a)(1), the Voting Rights Act of 1965, as amended in 1975, 42 U.S.C. § 1973, and the Civil Rights Act of 1871, 42 U.S.C. § 1983.

The essence of the plaintiffs' complaints is that the at-large systems operate to preclude the black population, which comprises one-third of the city population[2] and one-fifth of the county population,[3] from electing a member of its own race to any of the three governing bodies.

The Board of County Commissioners is composed of five members who serve staggered four-year terms. Although they must run for numbered places corresponding to the districts in which they live, they are elected at-large by the voters of the entire county. Each major party is required to hold a primary in which only party members may vote. Candidates run at-large for numbered places in the primaries, and a majority vote is required for the party nomination. There is no majority vote requirement in the general election.

The School Board of Escambia County is composed of seven members who serve staggered four-year terms. Five of the members must reside in residential districts but two

[2]Blacks represent 23% of the registered voters in the City of Pensacola.

[3]Blacks represent 17% of the county's registered voters.

may reside anywhere in the county.[4] Otherwise, the election process for the School Board is the same as that for the County Commission.

The Pensacola City Council has ten members. Candidates must run for numbered places corresponding to the five wards, and must live in the corresponding ward. The election, however, is at-large. There are no primaries, but there is a majority vote requirement.

Since 1955, blacks have been candidates for the County Commission four times, for the School Board five times and for the City Council nineteen times. As of the date of trial, no black had ever been elected to either the County Commission or the School Board,[5] and only two blacks had been elected to the City Council. The two black City Council members had initially been appointed to the Council to fill vacant seats and were then successful in their bids for reelection.

The plaintiffs argue that because of racially polarized voting,[6] and because of the at-large system of elec-

[4]The two seats without a residency requirement were added in 1976. 1976 Fla. Laws, ch. 76-356. This change is discussed in note 14, *infra*.

[5]After the trial in this case, Dr. Vernon McDaniel, a black educator, was elected to the school board.

[6]Expert statistical evidence was presented which showed a very high correlation between the percentage of blacks in a precinct and the number of votes a black candidate receives in that precinct. The district court discussed the racial polarization of voting at length.

> There is in Escambia County a consistent racially polarized or bloc voting pattern which operates to defeat black candidates. There is in the county an active Klu Klux Klan which has run at least one candidate for office and obtained a significant number of votes. More importantly, however, there is an even larger bloc of white voters who, like almost all black voters, consistently vote for the candidate of their race whenever black candidates face white candidates.
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> The complete record of county elections since 1955 was

tions, the votes of blacks in Pensacola and Escambia County are being diluted. In essence, their argument is

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brought before the court. The first black person to run for a county-wide office was John Reed, who was a candidate for the Escambia County Commission in May, 1966. He failed to make the runoff in the Democratic Primary. The R^2 coefficient of the correlation between Mr. Reed's vote returns and race was 0.98. The first black person to seek election to the Escambia County School Board was Otha Leverette in 1970. Rev. Leverette got the Democratic Party nomination without opposition; no other candidates qualified for this place. Some efforts were made to hide the fact he was black until the qualification date passed. But Leverette was beaten in the general election by a white Republican candidate, Richard Leeper. It was the first time in the modern history of Escambia County that a Republican had won any countywide office. Mr. Leeper received 22,523 votes even though there were at that time only 7,268 Republicans registered. There were 67,297 whites and only 13,037 blacks registered to vote. The R^2 coefficient for the correlation between Leverette's vote and race was 0.76, indicating a severely racially polarized vote. Richard Leeper had received only 10,712 votes in his race against a white Democratic candidate, Kirkland, in the 1966 school board general election.

This pattern of black candidates losing in racially polarized elections continues to the present. . . .

[Election] returns and regression statistics were analyzed by political scientists. The analyses focused upon voting returns from precincts which were 95% or more of one race. These returns, combined with regression statistics on all precincts, showed that whenever a black challenges a white for countywide office a significant majority of the whites who vote will consistently vote for the black's opponent. Sixty percent or more of the whites will do so in most cases. There were some differences in the testimony of plaintiffs' experts and defendants' expert. For example, the defendants' experts' approach to statistical analyses of polarization was somewhat different from that of plaintiffs' expert. Nonetheless, both found racial polarization in most, if not all, elections in which blacks ran.

Even though turnout among black voters is as high as that among white when black candidates run (it is regret-

that although blacks comprise a significant minority of the area, they will never be able to elect members of their race

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tably low for both races), and black voters vote almost unanimously for the black candidates, black candidates cannot attain a majority of the votes in the county because of the numerical inferiority of blacks combined with the white bloc vote. Several prominent white politicians acknowledged this fact.

The situation is much the same respecting the city. Although blacks constitute 33% of the city's population and 23% of its registered voters, with two noteworthy exceptions, black candidates have been denied office by the white bloc voting. All city election returns since 1955 were analyzed in the same manner as the countywide returns and again it was shown that most white voters showed a consistent preference for white candidates over black candidates resulting in consistent losses and frustration for the minority candidates. . . .

There have been only two exceptions to the white bloc vote in city elections. Two blacks, Dr. Spence and Hollice Williams, have been appointed by the council to fill vacant council seats and thereafter were both winners in their bids for reelection. The evidence strongly suggests that the absence of the white bloc vote against these two candidates is due to the fact that both were chosen and thereafter received public and private white political support. Indeed, one of the two had run for the council prior to his appointment, and was then soundly defeated by the usual white bloc vote. This effect of endorsement by community leaders is a common political phenomenon which is called "cuing." *See* V. O. Key, *The Responsible Electorate.*

Not all whites vote against blacks. In every race blacks have received some white support. But the city, like the county, is, by and large, a race conscious society. There is an established pattern of sufficient polarized voting to regularly defeat black candidates. White candidates do actively seek the votes of blacks. The studies of voter turnouts indicate, however, that when whites run against whites, black voter turnout drops, indicating a lack of interest by blacks in the candidates. Defendants' expert admitted that this may indicate that blacks view the choice of white candidates as irrelevant to their interests. Dist.Ct.Order, pp. 11-15.

to the governing bodies, and hence, their votes are worth less than those of their white counterparts. This claim has been presented to this court previously; *see, e.g., Cross v. Baxter,* 604 F.2d 875 (5th Cir. 1979); *Nevett v. Sides,* 571 F.2d 209 (5th Cir. 1978); *Blacks United for Lasting Leadership v. Shreveport,* 571 F.2d 248 (5th Cir. 1978); *NAACP v. Thomas County, Georgia,* 571 F.2d 257 (5th Cir. 1978); *Zimmer v. McKeithen,* 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd sub nom. East Carroll Parish School Board v. Marshall,* 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed. 296 (1976), and, more recently, to the Supreme Court in *City of Mobile v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980).

It should be noted that there is no allegation of any actual impediment to blacks voting, such as a poll tax or racially motivated gerrymandering of municipal boundaries. *Gomillion v. Lightfoot,* 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960).[7] Rather, the issue here is limited to a claim of vote dilution.

II. *City of Mobile v. Bolden*

[1] *City of Mobile v. Bolden,* 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), was pending before the Supreme Court when these cases were argued; accordingly, we postponed decision in these cases pending the *Bolden* decision. After *Bolden* was announced, we requested supplemental briefs from the parties. As Justice White predicted, however, we still are somewhat "adrift on uncharted seas with respect to how to proceed." 446 U.S. at 103, 100 S.Ct. at 1519.

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[7] In fact, the district court found that "[n]o impediments are thrown in the way of blacks to register and vote." Dist.Ct.Order, p. 10.

No view by the Supreme Court Justices commanded a clear majority. Mr. Justice Stewart, who authored the plurality opinion, joined by Justices Burger, Powell and Rehnquist, was of the view that a vote dilution claim, as opposed to an actual denial of the right to vote, is not a Fifteenth Amendment[8] claim at all, and that a Fourteenth Amendment claim had not been proven because the plaintiffs had not adduced adequate proof that the at-large election system constituted intentional discrimination against blacks, either in its inception or operation.

Although Justice Stevens considered a vote dilution claim to be a proper Fifteenth Amendment claim, he would require a plaintiff to prove that the system complained of is either "totally irrational or entirely motivated by a desire to curtail the political strength of the minority." 446 U.S. at 90, 100 S.Ct. at 1512.

In dissent, Justices Brennan, White and Marshall, for different reasons and in varying levels of vehemence, disagreed with the plurality that discriminatory purpose had not been shown in this case. Justice Marshall, joined by Justice Brennan, went further, arguing that an approach based on motivation is unworkable, and that proof

[8]Justice Stewart in *Bolden* gently chided this court and the district court for failing to address the complainant's statutory claim under § 2 of the Voting Rights Act of 1965. The plurality went on to hold, however, that the Section 2 of the Voting Rights Act does no more than elaborate on the Fifteenth Amendment. Under the plurality view, the *Bolden* plaintiffs had no valid Fifteenth Amendment claim and thus could not benefit from § 2 of the Voting Rights Act, either.

The plaintiffs here have urged this court to hold that there is an implied private cause of action under the Voting Rights Act and that they made out a case. Assuming there is a private cause of action and accepting the plurality opinion on the scope of § 2 (none of the other opinions addressed the issue), the plaintiffs cannot succeed under § 2 unless they can succeed under the Fifteenth Amendment. For a discussion of the viability of the Fifteenth Amendment in vote dilution cases, see note 9, *infra*.

of discriminatory impact alone should be sufficient. Justices White and Marshall both viewed the *Bolden* claim as a legitimate Fifteenth Amendment claim. Justice Brennan took no position on this.

Justice Blackmun assumed that if Justice Stewart is correct that discriminatory purpose must be shown, the evidence would support a finding of intent. He concurred in the result, however, because he disagreed with the remedy ordered by the district court.

Because no one analysis captured five Justices, we must determine the view with which a majority of the Court could agree. There were five clear votes (Stewart, Burger, Powell, Rehnquist and Stevens, JJ.) against the proposition that discriminatory impact alone is sufficient in vote dilution cases. Accordingly, to win a majority of the Court, in addition to impact, discriminatory purpose of some sort must be proven. Justice Stevens articulated the most conservative opinion on the extent to which such purpose must be shown. Because no other Justice concurred in his opinion, that discriminatory purpose must be the *only* purpose, we reject that analysis. Instead, we adopt Justice Stewart's opinion, though it commanded only four votes. If, in addition to impact, a discriminatory purpose exists in the enactment or operation of a given electoral system, all members of the Court save Justice Stevens agree that that system is unconstitutional.[9]

[9]Here, as in *Bolden*, the plaintiffs' complaint alleges violations of the Fourteenth and Fifteenth Amendments. Because Justices Brennan and Blackmun expressed no view as to the appropriate amendment under which to analyze a vote dilution claim, the majority view is unknown. Three Justices indicated this is a proper Fifteenth Amendment claim (Stevens, White and Marshall, JJ.); but the four Justice plurality opinion indicated it is not. We adopt the plurality view that vote dilution violates only the Fourteenth Amendment. Accordingly, the plaintiffs cannot succeed under either the Fifteenth Amendment or § 2 of the Voting Rights Act. *See* note 8, *supra*.

III. *Do the At-Large Electoral Systems Here Exist Because of Purposeful Discrimination?*

Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), teaches us that an inquiry into legislative purpose is not an easy one. "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 429 U.S. at 266, 97 S.Ct. at 564. The Court suggests several possible evidentiary sources for such a determination. Among them are: (1) the historical background of the action, particularly if a series of actions have been taken for invidious purposes; (2) the specific sequence of events leading up to the challenged action; (3) any procedural departures from the normal procedural sequence; (4) any substantive departures from normal procedure, i.e., whether factors normally considered important by the decisionmaker strongly favor a decision contrary to the one reached; and (5) the legislative history, especially where contemporary statements by members of the decisionmaking body exist. 429 U.S. at 267-68, 97 S.Ct. at 564.

The Stewart opinion in *Bolden* held that the so-called *Zimmer* factors regarding discriminatory impact (*see Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976)) were insufficient, standing alone, to support a finding of discriminatory purpose. Fortunately, the district court below correctly anticipated that the *Arlington Heights* requirement of purposeful discrimination must be met, and thus made explicit findings concerning intent in addition to and apart from its *Zimmer* findings. Accordingly, there is no need to remand the case for a

determination of whether purposeful discrimination exists. *See Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 272-73, 97 S.Ct. 555, 567, 50 L.Ed.2d 450 (White, J., dissenting).

A. *The County Commission*

[2] The at-large system for electing county commissioners is mandated by a 1901 amendment to the Florida Constitution. Fla. Const., art. 8 § 5. There is considerable evidence that at about that time the white citizens of Florida adopted various legislative plans either denying blacks the vote entirely or making their vote meaningless. For example, Jim Crow laws were instituted in the early 1900's, the Democratic Party established the white primary[10] in 1900, and there was widespread disfranchisement of blacks.[11]

Although many actions in the early 1900's had a clear invidious purpose, this court held in *McGill v. Gadsden County Commission*, 535 F.2d 277 (5th Cir. 1976), which also involved an at-large system mandated by the 1901 amendment to the Florida Constitution, that no racial motivation was behind the amendment. This, according to *McGill* and Dr. Shofner, the plaintiff's expert historian, is because there was such widespread disfranchisement of blacks by that time that they did not represent a political threat. Thus, relying upon *McGill* as reinforced by the

[10]Because the Democratic Primary was tantamount to the election, the exclusion of blacks from the primary effectively denied them the vote. Furthermore, the primary was conducted as a single-member district election. In essence, therefore, commissioners were elected in single-member districts though the general election was conducted at-large.

[11]*See generally* C. Vann Woodward, *The Strange Career of Jim Crow* (3rd ed. 1974).

conclusions of Dr. Shofner, the district court held that the at-large system for electing county commissioners was not adopted for discriminatory purposes. Based upon the evidence, this finding of the district court was not clearly erroneous and supported the court's conclusion.

Although the at-large system did not have its genesis in a purposeful attempt to exclude blacks from the political process, under the Stewart analysis in ***Bolden,*** invidious purpose in the operation of the plan will also invalidate it. 446 U.S. at 65, 100 S.Ct. at 1499. The district court held the at-large system for electing county commissioners is being perpetuated for invidious purposes. According to the district court, evidence of such an intent can be found in the fact that the County Commission has twice rejected the recommendations of its own charter government committees that the county change to single-member districts.

Four county commissioners testified at trial that race did not motivate their refusal to submit the issue of single-member districts to the electorate. Each stated that it was his personal belief that all voters of the county should be allowed to vote on each of the commissioners so the board would be more responsive to the needs of the community as a whole. Thus, the commissioners asserted "good government" reasons for perpetuation of the at-large system.

The district court held, however, that the purpose of perpetuating the present system was not legitimate.

> In their post-trial memorandum, defendants admit that the rejection of the single-member district aspect of the charter proposal "reflects the commissioners' desire to maintain their incumbency." This was also the court's impression at trial. Each of these commissioners had been

> elected in countywide elections. They could not know how they would fare in single district elections. Yet it is apparent that in such elections one or more of them might be replaced by blacks.
>
> To this court the reasonable inference to be drawn from their actions in retaining at-large districts is that they were motivated, at least in part, by the possibility single district elections might result in one or more of them being displaced in subsequent elections by blacks.
>
> * * * * * *
>
> That [the commissioners'] motivations may be selfish rather than malicious toward blacks does not alter the conclusion that their intent was to continue the present dilution of black voting strength. The present at-large election system for county commissioners is being maintained for discriminatory purposes.[12]

If the district court is correct in its conclusion that the at-large election system is being maintained for discriminatory purposes, then we must affirm its ultimate decision that the system is unconstitutional.

We have reviewed the testimony, however, and found no evidence of racial motivation by the county commissioners in retaining the at-large system. The trial court stressed defendant's statement in a post-trial memorandum that rejection of the charter proposal reflected the commissioners' desire to retain their incumbency. Retention of incumbency was never mentioned in the testimony. Moreover, in our view the desire to retain one's incumben-

[12]Dist.Ct.Order, pp. 30-31.

cy unaccompanied by other evidence ought not to be equated with an intent to discriminate against blacks *qua* blacks. The commissioners all testified that racial considerations played no role in their rejection of the charter proposal; the plaintiffs introduced no evidence to the contrary. The trial judge, of course, was entitled not to believe the commissioners' testimony; in the absence of contradictory evidence, however, disbelief of that testimony is not sufficient to support a contrary finding. *See Moore v. Chesapeake and Ohio Railway*, 340 U.S. 573, 576, 71 S.Ct. 428, 429, 95 L.Ed. 547 (1951). Therefore, the evidence falls short "of showing that the appellants 'conceived or operated [a] purposeful [device] to further racial discrimination.' " 446 U.S. at 66, 100 S.Ct. at 1499, *quoting Whitcomb v. Chavis*, 403 U.S. 124, 149, 91 S.Ct. 124, 149, 91 S.Ct. 1858, 1872, 29 L.Ed.2d 363 (1971).

B. *The School Board*

[3] An at-large system for electing School Board members was established by state law in 1947. Fla. Stat. §§ 230.08, .10 (1975). The district court discussed the enactment of that law, and, applying the *Arlington Heights* criteria, found it to have been born from a desire to exclude blacks.

From 1907, 1907 Fla.Laws, ch. 5697, § 1, until 1945 there was clear support for single-member district elections for School Board members. During this period the primary elections for School Board members were conducted as single-member district elections, while the general elections were at-large. Because the all-white Democratic primary was tantamount to the election, from 1907 through 1945 the School Board was a de facto, if not de jure, single member district body. Thus, in 1945 the clear policy of the citizenry of Escambia County was to

favor single-member district elections for School Board members.

The 1945 decision in *Davis v. State ex rel. Cromwell,* 156 Fla. 181, 23 So.2d 85 (1945) (en banc), changed that, however, by declaring unconstitutional the white primary. In the very first legislative session following *Davis,* the legislature enacted statutes requiring at-large elections in both the primary, 1947 Fla.Laws, ch. 23726, § 7, and the general election, 1947 Fla. Laws, ch. 23726, § 9.

Looking at the change from single-member districts to at-large districts through *Arlington Heights* glasses, the conclusion that the change had an invidious purpose is inescapable. The specific sequence of events leading up to the decision mandates the conclusion that the citizens of Escambia County in 1945, with the demise of the white primary, were not going to take any chances on blacks gaining power and thus purposefully sought to dilute black voting strength through the use of an at-large system. Furthermore, the history of the county suggests a substantive policy which favored single-member districts for the election of School Board members. The abrupt, unexplained departure from that forty-year policy upon the heels of the white primary's demise justifies the district court's conclusion that the change was racially motivated. Accordingly, we concur in the statement of the district court that "[t]he evidence of discriminatory motives behind the at-large requirements of the 1947 system is compelling."

There is recent evidence of community awareness that the effect of the at-large system is to dilute the voting strength of blacks, and evidence that the dilutive effect will be capitalized on by the white majority to keep the School Board responsive to them. In 1975 the School Board took a position favorable to black interests on the

question of whether the nickname "Rebel" should continue to be used at Escambia County High School.[13]

The district court found, that, in at least partial retaliation against the Board for its decision on the issue, the legislative delegation introduced a bill to increase the size of the Board to seven members, to change from an elective to an appointive school superintendent, and to reduce the salaries of Board members. The bill as introduced had the unanimous support of the local delegation.[14] As is required by state law, a referendum election was held to present the bill to the Escambia County electorate for ap-

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[13]In 1973, black students intervened in the federal school desegregation suit to challenge the continued use of the nickname "Rebel" at Escambia County High School. White students and parents also intervened, but in defense of the nickname. This provoked considerable racial unrest in the school.

The district court enjoined further use of the "Rebel" name, *Augustus v. School Board of Escambia County*, 361 F.Supp. 383 (N.D.Fla. 1973), but the decree was modified on appeal. 507 F.2d 152 (5th Cir. 1975). The Fifth Circuit directed the district court to give the Board the opportunity to resolve the "Rebel" issue on its own. The Board's solution was to permit reinstatement of the nickname if there was a two-thirds majority vote in favor of doing so by the students at the high school. The matter was voted on and though a majority of the students voted in favor of reinstatement, it was not a two-thirds majority.

There was an angry reaction to the result and at least one attempt was made to influence a School Board member to vote to reinstate the nickname notwithstanding its failure to garner the support of two-thirds of the student body. The School Board did not capitulate, and its tenacity led to the "Board packing" episode, *infra*.

[14]Changes in local governments are submitted to the Florida Legislature through the local delegation, generally based on a resolution by the local government. As a practical matter, local legislation will pass the legislature if it has the unanimous support of the local delegation. The proposed change is then submitted to the electorate in the form of a referendum. Discriminatory intent at any stage will infect legislation.

proval. The proposals to increase the size of the Board and to reduce members' salaries passed overwhelmingly, but the provision to change to an appointed superintendent was defeated.[15]

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[15]Generally, the change from a five-member to a seven-member school board is accompanied by a change from an elected to an appointed superintendent. By separately submitting the two proposals, Escambia County is now the only county in Florida to have a seven-member board and an elected superintendent.

The School Board challenged the change to a seven-member board in court. The Florida Supreme Court held against the board, stating that "[t]he political motivations of the legislature, if any . . . are not a proper matter of inquiry for this Court." *School Bd. of Escambia Co. v. Florida*, 353 So.2d 834, 839 (Fla. 1977) (Hatchett, J., dissented).

As a general rule, a court does not inquire into the political motivations of legislators. The Supreme Court stated in *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 at 265-66, 97 S.Ct. 555 at 563:

> [I]t is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.

(footnote omitted). It appears that the School Board did not argue in state court that the plan to increase its number had an invidious purpose, and thus, the Florida Supreme Court cannot be faulted for deferring to the legislature. In this court, however, the plaintiffs have made it painfully obvious that invidious purposes still motivate some of Florida's legislators' decisions. Such motivations were made not simply undesirable but unconstitutional over one hundred years ago. People have become more subtle and more careful in hiding their motivations when they are racially based. This makes the district court's inquiry in the first instance and ours on review more difficult. However, it is obviously equally important to invalidate actions motivated by subtle, hidden invidious purposes as it is to do away with more blatant forms of discrimination.

It is impossible to know unequivocally what motivated the electorate to vote to increase the size of the School Board. However, the fact that an earlier referendum for such an increase failed by a two-to-one margin, in conjunction with the racially charged atmosphere at the time of the second referendum, strongly suggests the vote was racially motivated. The district court described the situation as follows:

> The 1976 change in the school board's election system was avowedly to pack the board to make it more responsive to the white majority on a particular racially polarized issue . . . . This is a telling indication of the legislators' and community's recognition and use of the at-large system as a method of rendering black voters politically impotent to the desires of the white majority.

Dist.Court Order, p. 31.

The district court correctly held that the at-large system of electing School Board members was developed with a discriminatory purpose and is being utilized by the majority population for such a purpose. Accordingly, the district court was correct in holding the at-large system for electing School Board members unconstitutional.[16]

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[16]The district court, in determining that the School Board election plan was being maintained for discriminatory purposes, stated that it considered *Zimmer* factors in conjuction with other evidence. *Zimmer v. McKeithen* has been invalidated by *Bolden* and any conclusion based solely on *Zimmer* factors would be erroneous. Here, however, the court's conclusion that the plan had been maintained for discriminatory purposes was based on other evidence, *i.e.*, the 1976 referendum, in conjunction with the *Zimmer* factors. Moreover, as regarding the School Board, a finding of discriminatory motive in maintaining the system is not necessary to invalidate it; the court's finding of discriminatory intent in the creation and discriminatory impact suffice to satisfy the *Bolden* standard.

C. *City Council*

In 1931 a council-manager form of government was instituted in Pensacola. As originally enacted, it provided for ten council members: five were elected from single-member wards and five were elected at-large but with a ward residency requirement.

In 1955, a black ran a very close race against a white for one of the single-member district seats. There was testimony that when the council next reapportioned the wards, it purposefully gerrymandered that ward to increase its percentage of whites. Furthermore, three years later, the council asked the local legislative delegation to change the law so that all the council members would run at-large. A man who served on the city council at that time testified at trial, and the following colloquy occurred:

> THE COURT: And the reason for that change [to 10 at-large seats] was what?
>
> A. Was because then we wouldn't have this hassle of reapportioning to keep so many blacks in this ward and so many whites in that ward and keep the population in balance as to race.

(R. XVI-605).

Other evidence of an invidious purpose in changing those five single-member district seats to at-large seats came in testimony by then-Governor Reubin Askew. In 1959, Askew was a first-term state representative from Escambia County. He testified that he did not have a discriminatory motive in supporting the change to all at-large seats, testimony which was credited by the district court. He further testified that though he was unaware of the council members' motives generally, he was aware that one council member had indicated the change was wanted to avoid a "salt and pepper council."

On the eve of the referendum election at which the change to all at-large seats was at issue, an editorial in the *Pensacola Journal* stated that there would be advantages to having all council members elected at-large. "One reason is that small groups which might dominate one ward could not choose a councilman. Thus, one ward might conceivably elect a Negro councilman though the city as a whole would not. This probably is the prime reason behind the proposed change."

It is not easy for a court in 1981 to decide what motivated people in 1959. The series of events leading up to the current system of electing the city council of Pensacola, however, certainly suggest racial motivation. Furthermore, though not legislative history, editorials written contemporaneously with the action are probative evidence of the motivation of the action.

The district court found that "[t]he conclusion of plaintiffs' expert historian that race was a concurrent motivating factor in the 1959 change is inescapable (footnote omitted)." We agree.

IV. *Conclusion*

Having found that the at-large systems for electing school board members and city council members were born out of a desire to keep blacks from being elected, our inquiry is virtually complete.

[4] The Supreme Court in *Bolden* found proof of purpose to be the major stumbling block, apparently agreeing that if the Mobile system had been established intentionally to keep blacks from being elected, then a constitutional case[17] would have been made. In other words, while

[17] *See* note 9, *supra*, for a discussion of which constitutional provision has been violated.

there is nothing *per se* unconstitutional about the at-large system of electing local governmental bodies, *e.g.*, *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971), if the purpose of adopting or operating that particular system is invidiously to minimize or cancel out the voting potential of racial minorities, and it has that effect, then it is unconstitutional.

In this case we agree with the district court that the at-large systems for city council and school board were purposely adopted to minimize the voting strength of the black community. Because it is undeniable that the systems have in fact had that effect,[18] we conclude that they are unconstitutional.

The defendants argue that such a conclusion is not warranted because: (1) white candidates actively seek black support; (2) the district court found them to be responsive to the needs of the black community; and (3) as to the city, there is no evidence that the system is being maintained for invidious reasons.

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[18]The defendants argued at length in their briefs and at oral argument that there is no discriminatory effect in this case because whites campaign for black votes and were found to be generally responsive to the needs of the black community. The defendants' argument misses the point. That the governing body may be benevolent is not relevant. The effect necessary for a case to be made is dilution of the votes of the minority. This is generally proven by evidence that a substantial minority is consistently unable to elect candidates of its choice.

In this case it is very clear that the at-large systems are having the effect they were designed to have – blacks are consistently defeated in their bids for elective office. This is not to be interpreted to mean, of course, that every time a black is defeated in a head-to-head race against a white that the election is tainted. We hope eventually we will reach the point where local governing bodies can be elected on an at-large basis, and people will vote for candidates based on their individual merit and not on the color of their skin. Unfortunately, we have not yet reached that stage.

The first two arguments grow out of the district court's analysis of the now-discredited *Zimmer* criteria. After *Bolden* it would seem that neither of those two factors, whether whites campaign for black support or whether the people in elective positions are responsive to minority needs, is relevant to the constitutional inquiry. Rather, the inquiry is more circumscribed – was the system purposefully designed or perpetuated to minimize the voting strength of a recognizable, distinct class which has been singled out for different treatment under the laws, *Castaneda v. Partita,* 430 U.S. 482, 494, 97 S.Ct. 1272, 1280, 51 L.Ed.2d 498 (1977), and does it have that effect? Whether current office holders are responsive to black needs and campaign for black support is simply irrelevant to that inquiry; a slave with a benevolent master is nonetheless a slave.

We can similarly dispose of the city council's argument that because there is a finding that its at-large system is not being perpetuated to minimize black voting strength, it is immune from constitutional attack. Essentially, it argues that the passage of time can transform an unconstitutional system into a constitutional one. We disagree. If the system was unconstitutional in its inception and if it continues to have the effect it was designed to have, then the pure hearts of current council members are immaterial.[19]

The judgment of the district court is AFFIRMED in part and REVERSED in part.

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[19]That is not to say pure hearts on the part of council members are not desirable or laudable but only that this is not relevant to the issue here presented. Our purpose is to correct a system which was set up to, and does, minimize the voting strength of a sizeable minority of the population. We are not here to punish or praise the current policies or motivations of these council members – good people can be elected by a bad system. It is the system that is unconstitutional and that must be corrected.

2. Decision of the Fifth Circuit in *McMillan v. Escambia County, Florida*, 638 F.2d 1249 (5th Cir. 1981).

Henry T. McMILLAN et al.,
Plaintiffs-Appellees,

v.

ESCAMBIA COUNTY, FLORIDA, et al.,
Defendants-Appellants.

No. 80-5011.

United States Court of Appeals,
Fifth Circuit.

Feb. 19, 1981.

Appeals from the United States District Court for the Northern District of Florida; Winston E. Arnow, Chief Judge.

Richard I. Lott, County Atty., Ray, Patterson & Kievit, P.A., Pensacola, Fla., Rhyne & Rhyne, William S. Rhyne and Charles S. Rhyne, Washington, D.C.; for defendants-appellants.

Blacksher, Menefee & Stein, P.A., J. U. Blacksher, Mobile, Ala., Kent Spriggs, Tallahassee, Fla., Jack Greenberg, New York City, Edward Still, Birmingham, Ala., for plaintiffs-appellees.

Before COLEMAN, PECK* and KRAVITCH, Circuit Judges.

*Senior Circuit Judge of the Sixth Circuit, sitting by designation.

KRAVITCH, Circuit Judge:

This is an appeal from the remedy ordered by the district court to correct the found unconstitutionality of the system for electing county commissioners. Because we held today in No. 78-3507, 638 F.2d 1239, that the at-large system for electing county commissioners is not unconstitutional, the order appealed from is hereby VACATED.

3. Memorandum Decision and Order of the United States for the Northern District of Florida in *McMillan v. Escambia County, Florida*, PCA No. 77-0432 (N.D. Fla. Dec. 3, 1979).

a. Memorandum Decision.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

HENRY T. McMILLAN, et al.,
Plaintiffs,
vs. PCA No: 77-0432

ESCAMBIA COUNTY, FLORIDA, et al.,
Defendants.
_____/

MEMORANDUM DECISION

On September 24, 1979, this court in memorandum decision held that Escambia County did not have the legislative authority to reapportion itself so that, if the voters rejected the proposed county charter, the court would be forced to adopt a judicially devised plan for redistricting that utilized five single-member districts. On November 6, 1979, the voters of Escambia County rejected the proposed charter and, accordingly, the court held a hearing on November 26 to consider and determine the exact plan to be approved and placed into effect as judicially adopted by the court. In a letter to all counsel of record, the court invited both sides to submit proposed plans as to the appropriate district boundaries with the

suggestion that there was some merit in having the districts conform to those adopted for the election of members to the Escambia County School Board.

At the hearing, the county declined to take a position as to appropriate district lines. Plaintiffs found the school board plan acceptable. Accordingly, it is the decision of this court that, for purposes of electing members of the Escambia County Board of County Commissioners, Escambia County shall be reapportioned into five single-member districts, the boundaries of which shall conform to those adopted by the court in its order of February 27, 1979, respecting election of members to the Escambia County Board of Education.

The county did request that the single-member plan be "phased-in" by permitting Commissioners John Frenkel and Kenneth Kelson to serve out the balance of their terms as commissioners, which expire in 1982. Under the county's plan, Commissioners Frenkel and Kelson would complete the four year terms to which they had been elected in the previous at-large election, with Districts 2 and 4 each electing no commissioner until 1982. Under the county's suggestion, Districts 1, 3 and 5 would elect representatives to four year terms in 1980. District 3 is the only district that has a black majority; that district would be afforded opportunity to elect a commissioner at the earliest possible opportunity, under the county's proposal.

Plaintiffs oppose the county plan. Instead, plaintiffs seek to have the entire commission elected in 1980 with the representatives of Districts 1, 2 and 3 to serve four year terms and the representatives of Districts 4 and 5 to serve two year terms. In 1982, representatives of Districts 4 and 5 would be elected to four year terms and thus the system of staggered elections would be preserved.

Having reviewed the arguments presented at hearing, the post-hearing briefs submitted by the parties, and its own research into the question, the court finds that the plaintiffs' plan providing for the election of all members of the County Commission in 1980 should be adopted.

The county contends that "phasing-in" the single-member plan will minimize any disruption that might result from a complete turnover of commissioners in 1980 by enabling the two incumbents to lend their experience and facilitate the transition from at-large to single-member districts. The county also asserts the two commissioners were duly elected to four year terms running through 1982 and thereby have some degree of entitlement to finish them. Moreover, permitting them to serve out their full terms will avoid the expense of two elections in 1980 and will avoid forcing two commissioners elected in 1980 to serve truncated terms of only two years.

The court has considered these arguments but finds there are compelling arguments to the contrary. Most importantly, where a governing authority is found to be holding office by virtue of an election scheme which is constitutionally infirm, a court, under its equitable authority, should take steps to correct such defects at the earliest possible date. *Wallace v. House,* 377 F.Supp. 1162 (W.D. La. 1974), *aff'd,* 538 F.2d 1138 (5th Cir. 1976) and cases cited therein. Moreover, while "phasing-in" the single-member plan, as suggested by the county, would give, as would plaintiffs' proposal, reasonable opportunity to the plaintiff class to elect a commissioner at the earliest possible opportunity, the county's suggestion would also create a situation in which some citizens of the county had greater representation than others. From 1980 to 1982 three districts would have their own representatives while

the other two would have representatives who were elected by the entire county. Election of commissioners from all districts in 1980 provides the speediest means to insure equal representation for all citizens of Escambia County.

Furthermore, there are countervailing considerations to other arguments advanced by the county. All candidates for commissioner in the 1978 election ran with the knowledge that, due to prior rulings in this suit, new elections were likely to be held in 1980. Moreover, "[n]o office holder has a vested right in an unconstitutional office any more than he has a right to be elected to that office." *Wallace v. House,* supra at 1201, quoting *Reynolds v. State Election Board,* 233 F.Supp. 323 (W.D. Okl. 1964) (three judge court). Finally, as plaintiffs point out, evidence adduced at earlier stages of the case indicates that incumbents in Escambia County are reelected with some degree of regularity. Thus, there is at least some possibility that, if all members on the commission are elected in 1980, there still will be some continuity in membership from the prior commission.

Therefore, the court finds that election of all five members of the Escambia County Board of County Commissioners in 1980 under a single-member plan is appropriate.

In reaching this conclusion, the court has not overlooked the fact that, as the county points out, its request is not without precedent. Suffice it to say that, in the factual situation here presented, the court concludes its finding here is the one it should make.

There remains the question of the best method to stagger the terms of the commissioners. Under the plan adopted for election of members to the school board,

Districts 1, 2 and 3 are to elect representatives in 1980 to serve two year terms, while Districts 4 and 5 elect members to four year terms. The rationale for such is that it provides for the election every two years of three school district officials, with three of them being school board members, and the other three being two school board members and the superintendent of schools. As the superintendent's elected term expires in 1980, there was provided for the election of only two members to serve four year terms commencing in 1980. As plaintiffs point out, adoption of a "mirror-image" plan for election of county commissioners will ensure that each district in the county will have one major county board office to vote for in each major election year. Moreover, adoption of a plan that calls for election in 1980 of three commissioners to four year terms will present a savings in expense to the county and the candidates. It will also mean three, instead of two, are elected in 1980 to the normal four year term. Therefore, the court finds that a proper plan calls for election of all commissioners in 1980 with representatives of Districts 1, 2 and 3 to serve terms of four years and representatives of Districts 4 and 5 to serve initial terms of two years. In subsequent elections, the terms of all elected will be for four years.

Order of this court will be entered in accordance with the foregoing.

DATED this 3 day of December, 1979.

/s/ Winston E. Arnow

WINSTON E. ARNOW, Chief Judge

b. Order.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

HENRY T. McMILLAN, et al.,
Plaintiffs,

vs. PCA No. 77-0432

ESCAMBIA COUNTY, FLORIDA,
et al.,
Defendants.

ORDER

Pursuant to and in accordance with Memorandum Decision of this date, it is

ORDERED AND ADJUDGED as follows:

1. For the purposes of electing members of the Escambia County Board of County Commissioners, Escambia County shall be reapportioned into five single-member districts, the boundaries of which shall conform to those adopted by this court in its Order of February 27, 1979, respecting election of members to the Escambia County Board of Education, a description of which shall be attached as an appendix to this order. A map of such plan shall be available for inspection in the office of the clerk of this court.

2. At the next regularly scheduled primary and general elections in 1980, commissioners representing all five single-member districts shall then be elected; provided, however, the court retains the power to alter the date of the aforesaid elections, upon the appropriate motion of

one or more of the parties or upon its own motion, depending in particular upon the course of future events in connection with appeals of this court's judgment or in related cases.

3. To preserve the staggered terms now provided by law for members of the Escambia County Board of County Commissioners, following their election in 1980, those commissioners elected from Districts 1, 2 and 3 shall serve terms of four years, while those elected from Districts 4 and 5 shall serve terms of two years, initially. Thereafter, all board members shall be elected for terms of four years.

4. Following the publication of each federal decennial census, the districts from which members of the Escambia County Board of County Commissioners are elected shall be reapportioned to fairly comply with one-person, one-vote requirements and the decrees of this court.

It is further ORDERED AND ADJUDGED that the defendants, Escambia County, the Board of County Commissioners of Escambia County, Gerald Woolard, Kenneth Kelson, Zearl Lancaster, John E. Frenkel, Jr., and Marvin Beck, individually and in their official capacities as members of the Escambia County Board of County Commissioners; Joe Oldmixon, individually and in his official capacity as Supervisor of Elections for Escambia County, their successors, officers, agents, servants, employees, and attorneys, and those persons in active concert of participation with them who receive actual notice of this order by personal service or otherwise, are hereby enjoined from failing to:

(1) Redistrict and reapportion as set out above;

(2) Make and hold the elections as redistricted and ordered above.

Pursuant to Section 3 of the Voting Rights Act of 1965, as amended in 1975, 42 U.S.C. § 1973a, the court retains jurisdiction of this action for a period of five years unless such period is shortened or extended by further order of this court. During the period of retained jurisdiction, no voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect at the time this action was commenced shall be enforced unless and until the court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color; provided that such qualification, prerequisite, standard, practice, or procedure may be enforced if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of Florida or of Escambia County to the Attorney General of the United States and the Attorney General has not interposed an objection within sixty (60) days after such submission, except that neither this court's findings nor the Attorney General's failure to object shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice or procedure.

DONE AND ORDERED this 3 day of December, 1979.

/s/ Winston E. Arnow

WINSTON E. ARNOW, Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

HENRY T. McMILLAN, et al., Plaintiffs,	)	
vs.	)	CIVIL ACTION No: 77-0432
ESCAMBIA COUNTY, FLORIDA, et al., Defendants.	)	

ELECTON PLAN OF DEFENDANT SCHOOL BOARD

In response to the Court's final judgment-dated July 10, 1978, Defendant School Board has adopted an election plan to be implemented in the event that the Court's judgment against Defendant School Board is ultimately affirmed. The plan is described as follows:

There shall be five School Board districts of contiguous territory as nearly equal in population as practicable. One School Board member shall reside in each district. The districts are defined by the numbers of the voting precincts as they existed on August 23, 1978, contained within each district as follows:

District 1	*District 2*	*District 3*	*District 4*	*District 5*
Population	Population	Population	Population	Population
41,238	40,845	40,525	41,530	39,785
Precincts:	Precincts:	Precincts:	Precincts:	Precincts:
1	2	12	4	6
5	3	13	17	7
26	24	14	35	8
28	25	15	39	10
41	32	27	40	11
43	34	31	42	16
54	44	48	46	18
55	47	49	50	19
61	57	56	51	20
70	58	62	63	21
83	59	76	64	22
87	65	90	66	23
97	71		72	33
99	77		93	36
100	78		94	37
102	79		96	45
105	80		98	53
113	81		106	69
	82		107	101
	84		108	111
	103		109	112
	104		110	
			114	

The population of each district estimated from 1970 U.S. Census date is set forth in the table.

District 3 was deliberately designed to effectuate a 55 per cent black population majority and a 60 per cent black electoral majority within the district. All other districts were designed without regard to race.

The electors residing in each of the five districts will elect a single School Board member who will reside within the district. In addition, the electors residing in the county

will elect two other School Board members to serve in numbered places without regard to the candidates' places of residence within or without a particular district.

In the first election to apply this plan, School Board members residing in Districts 1 and 2 and one of the School Board members elected at large will be elected to serve two-year terms; School Board members residing in Districts 3, 4 and 5, and the other School Board member elected at large will be elected to serve four-year terms. Thereafter, all School Board members shall be elected to serve staggered terms of four years.

Respectfully submitted,

LOUIS F. RAY, JR., P.A.
By /s/ Louis F. Ray, Jr.
Louis F. Ray, Jr.
A member of the firm
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School Board, et al.
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and

RHYNE & RHYNE
By: Charles S. Rhyne
A member of the firm
Of Counsel to
Attorneys for Defendant
School Board, et al.
1000 Connecticut Avenue, N.W.
Suite 800
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CERTIFICATE OF SERVICE

We hereby certify that a copy of the foregoing has been furnished to: J.U. Blacksher, Esquire and Larry T. Menefee, Esquire of Crawford, Blacksher, Figures & Brown, 1407 Davis Avenue, Mobile, Alabama 36603, Kent Spriggs, Esquire, 324 West College Avenue, Tallahassee, Florida 32301, Jack Greenberg, Esquire and Eric Schnapper, Esquire, Suite 2030, 10 Columbus Circle, New York, New York 10019, W. Edward Still, Esquire, 601 Title Building, Birmingham, Alabama 35203, Attorneys for Plaintiffs, and Don J. Caton, Esquire, Second Floor, City Hall, Pensacola, Florida, Attorney for Defendant City of Pensacola, and Richard I. Lott, Esquire, 28 West Government Street, Pensacola, Florida 32501, Attorney for Defendant Escambia County, by U.S. mail this 24th day of August, 1978.

/s/ Louis F. Ray, Jr.

LOUIS F. RAY, JR.

4. Memorandum Decision of the United States District Court for the Northern District of Florida in *McMillan v. Escambia County, Florida*, PCA No. 77-0432 (N.D. Fla. Sept. 24, 1979).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

HENRY T. McMILLAN, et al.,
Plaintiffs,

vs. PCA No: 77-0432

ESCAMBIA COUNTY, FLORIDA, et al.,
Defendants.
_____/

MEMORANDUM DECISION

This matter is before the court on the question of approval of a plan for electing county commissioners.

Heretofore the county commissioners in this county have proposed to this court a plan, by an ordinance adopted on September 21, 1978, providing for a seven member board of county commissioners, with five members to be elected from single member districts and two members to be elected by the voters of the county at large.

Because Escambia County was considering a change to a charter form of county government, plaintiffs requested the court to withhold action on that plan until a future date when the proposed form of charter government would be known. The defendants did not oppose such request and so the court has withheld action.

Now before the court is the fact that a charter commission appointed by the local legislative delegation of the Florida Legislature has proposed a county charter for the governing of Escambia County. A referendum election on that charter question has now been set for November 6, 1979, at which time the voters may approve or disapprove of the charter.

Parties before the court agree that the time is now ripe for this court to take action, both on the plan heretofore proposed by the county commissioners, and the one provided for in the proposed county charter.

The plan provided for in the proposed county charter calls also for a seven member board of county commissioners with five members to be elected from single member districts and two members to be elected by the voters of the county at large. Thus, the two plans before the court are strikingly similar. There is a difference in that, while the plan submitted to the court by the defendant county commissioners fixes the boundaries of contiguous and compact districts conforming as nearly as possible with the one man one vote requirement, such task under the charter government proposal would be undertaken by a reapportionment commission.

In *Wise v. Lipscomb,* 437 U.S. 535 (1978), the court held that a plan of reapportionment submitted by the City of Dallas should be considered not as judicially imposed, but as legislatively enacted, and accorded deference as such. Five of the justices said that legislative authority was required before the plan could be considered as legislative in nature; four said the plan should be so considered even though the commission had no legislative authority. Of the five justices, two found that the record before the court suggested no statutory, state constitutional, or

judicial prohibition on the authority of the city council to enact a municipal election plan under circumstances such as those presented there and that the court was in no position to overturn the district court's acceptance of the city ordinance as a valid legislative response to the court's declaration of unconstitutionality. The other three justices said that the legislative authority did not exist.

As this court understands the decision, a majority of the court, therefore, holds that in a situation like the one presented here there must exist legislative power before any plan adopted by the board of county commissioners of this county may be considered by this court as legislatively adopted.

The Constitution of Florida prohibits any form of election for county commissioners other than the at large system. It was that system that has been found unconstitutional by this court, insofar as these defendants are concerned.

However, the Florida Constitution also provides that the Escambia County Commission has "only such power of self government as is provided by general or special law." Thus the county commission of Escambia County does not now possess the legislative authority to reapportion itself so that the plan adopted by it may not, under *Wise*, be given legislative deference. Instead, any plan submitted by it must be treated instead as one judicially devised and imposed.

Under the authorities before the court, a judicially devised plan must require total use of single member districts unless persuasive justification to the contrary exists. No such persuasive justification is here established. Because of that, the plan heretofore submitted by the county commission of Escambia County must be disapproved by this court.

However, respecting the proposed charter commission plan, even though it is substantially the same election plan, the test to be applied by this court is a different one. Under Florida's Constitution, counties operating under charters have all powers of local self government not inconsistent with general law or with a special law approved by the vote of the electors. Thus, if the voters of Escambia County had, by referendum, approved the proposed charter so that it then becomes effective, the seven member plan incorporated in it should be treated by this court as a legislatively adopted plan.

In motion before this court, plaintiffs have stated that:

> 3. In consideration of the opportunity for a speedier reapportionment providing single-member districts, and for the limited purpose of this motion for court action prior to the November 6 charter referendum, plaintiffs waive any objection they may have to the five-two reapportionment scheme proposed by the Charter Commission, subject to the condition that district boundaries subsequently drawn if the charter is approved remain subject to review by this court for compliance with the remedial purposes of its prior judgments herein.

In *Wise*, the legislative remedy plan which was approved contained two black districts out of eleven. Dallas was at that time approximately 25% black. Thus, the districts in which the blacks were reasonably assured of being able to obtain black representation constituted approximately 18% of the total districts and so, to that extent, was not proportional to the black population percentage.

In the instant case blacks constitute approximately 20% of the population of Escambia County. The evidence before the court does establish that the county may be

drawn into five single member districts, complying with the one man one vote requirement, and with one of those districts having sufficient number of blacks so as to reasonably assure the ability to elect a black candidate in one district.

Thus, there is presented before this court a situation in which blacks may be reasonably assured of only one of the seven seats on the county commission, or 14.3% of the total number of seats. As in the *Wise* case, they are not reasonably assured of seats in proportion to their population.

However, in view of the plaintiffs' position taken before this court, and at least similarities in percentages between the situation here presented and the situation existing in *Wise,* the court concludes it should give its tentative approval, as suggested by the parties, to the reapportionment plan contained in the proposed Escambia County charter to be submitted to the referendum election on November 6, 1979.

Such approval is subject to the condition that the single member district boundaries that may subsequently be drawn by the reapportionment commission, if the proposed Escambia County charter is approved, shall be submitted to the court for its review and approval as an adequate remedy for the present racially discriminatory election system.

DATED this 24th day of September, 1979.

/s/ Winston E. Arnow

WINSTON E. ARNOW, Chief Judge

5. Memorandum Decision and Judgment of the United States District Court for the Northern District of Florida in *McMillan v. Escambia County, Florida*, PCA No. 77-0432 (N.D. Fla. July 10, 1978).

a. Memorandum Decision.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

HENRY T. McMILLAN, et al.,
Plaintiffs,

vs. PCA No. 77-0432

ESCAMBIA COUNTY, FLORIDA, et al.,
Defendants.

ELMER JENKINS, et al.,
Plaintiffs,

v. PCA No. 77-0433

CITY OF PENSACOLA, et al.,
Defendants.

MEMORANDUM DECISION

These consolidated actions were filed on March 18, 1977 by black citizens of Pensacola and Escambia County, Florida alleging that the at-large systems of electing members of the Board of County Commissioners of Escambia County, the School Board of Escambia County, and the City of Pensacola Council deny black citizens equal access to the political process leading to nomination and election to such governmental bodies. Plaintiffs contend that, accordingly, the at-large election systems are

fundamentally unfair, with respect to black citizens, and violate their rights protected by the first, thirteenth and fifteenth amendments to the Constitution of the United States; both the Due Process and Equal Protection clauses of the fourteenth amendment; the Civil Rights Act of 1870, 42 U.S.C. § 1971(a)(1); and the Voting Rights Act of 1965, 42 U.S.C. § 1973.

Defendants in Civil Action No. 77-0432 are Escambia County, Florida; the incumbent members of the Board of County Commissioners of Escambia County, who are sued individually and in their official capacities; the School District of Escambia County; the School Board of Escambia County; the members of the School Board of Escambia County, who are sued individually and in their official capacities; and the incumbent Supervisor of Elections for Escambia County, who is sued individually and in his official capacity. The defendants in Civil Action No. 77-0433 are the City of Pensacola, Florida; the incumbent members of the Pensacola City Council, who are sued individually and in their official capacities; the Clerk for the City of Pensacola, who is sued individually and in his official capacity; and the Supervisor of Elections for Escambia County, who is sued individually and in his official capacity.

By way of relief plaintiffs seek a declaratory judgment and injunction against the present at-large election systems and an order requiring that the aforesaid local governmental bodies be apportioned into single-member districts so that all members of the county commission, the school board and the City Council of Pensacola will be elected in a manner that avoids debasing, diluting, minimizing or cancelling out the voting strength of black citizens. Plaintiffs also seek an award of their attorneys' fees and costs and other general equitable relief.

Many of the facts and much of the law in these two cases are the same. Because this is so, to avoid repetition, one memorandum decision containing findings of fact and conclusions of law will be entered in the consolidated cases. Varying factual matter and points of law between the cases will, to the extent necessary, be dealt with separately in this decision.

THE BACKGROUND OF THE THREE ELECTION SYSTEMS

The Board of County Commissioners is the legislative and governing body of Escambia County. The board is composed of five members who serve for four years staggered terms and receive annual salaries of $20,402.88. Although they each must run for numbered places corresponding to the individual districts in which they live, repectively, they are elected at-large by the qualified voters of the entire county. Thus they must each run for office in a single district covering approximately 657 square miles (fifty-one miles in length) with a population of 205,334 in 1970 and a projected population of 269,508 in 1980. 1970 United States Census. There is no majority vote requirement to be elected, although no one has ever been elected without a majority. Political parties given major party status by the state are required to hold primaries in which only party members vote. Candidates also run at-large for numbered places in the primaries, and a majoriy vote is required for the nomination.

The School Board of Escambia County is the local governmental body charged with organizing and controlling the public schools of the School District of Escambia County. The School Board is composed of seven members who serve four year staggered terms. Five of the members

must reside in residency districts; two may reside anywhere in the county. All of them run for numbered places and are elected at-large in the county just as the county commissioners are. There is no majority vote requirement, but no one has been elected without a majority. The party nominating procedure is identical to that of the county commissioners.

The Pensacola City Council is a ten-member panel which serves as the city's policymaking body. The members must run for numbered places, two from each of five wards in which they must reside. They must, however, run at-large in a city with a projected 1980 population of 62,547 (59,507 in 1970). 1970 United States Census. Elections are nonpartisan with a majority vote requirement.

The board of county commissioners and school board election system had their genesis in the midst of a concerted state effort to institutionalize white supremacy. Until 1901, the county commissioners were appointed by the governor. The evidence shows that appointment was favored over election to ensure against the possibility that blacks might be elected in majority black counties. Efforts to keep blacks out of government at the county level began during Reconstruction and were greatly intensified during the state's "redemption" by white Democrats. To ensure that blacks were not elected in majority black counties, county commissioners were appointed by the governor from 1868 to 1901. The poll tax was instituted in 1889 to disenfranchise blacks. 1889 Fla. Laws, ch. 3850, § 1. Although black voter registration remained high, at least in some parts of the state, up until the turn of the century, enough blacks were disenfranchised to permit the state to allow at-large election of county commissioners, Fla. Const., art. 8, § 5 (1901), and the members of the newly

created boards of public instruction (counterpart of today's school boards).[1] 1895 Fla. Laws, ch. 4328.

Black participation in the electoral process was further hampered by the Jim Crow laws and the exclusion of blacks from the Democratic Party, both of which began in 1900. A few years later, the state provided for primary elections of county commissioners and board members in which the candidates were elected from single-member districts. 1907 Fla. Laws, ch. 5697, § 1. By that time the white primary system, effectively disenfranchising black voters, was firmly established. The resulting anomaly between having district primary elections and at-large general elections worked, not surprisingly, to the unique disadvantage of blacks. Since blacks could not vote in the Democratic Primary district elections, they were forced to challenge white Democratic nominees in at-large elections in which blacks had no voter majorities. In effect, the white primary was the election. Because blacks were excluded it was finally struck down by the Florida Supreme Court in 1945. *Davis v. State ex rel. Cromwell,* 156 Fla. 181, 23 So.2d 85 (1945).

The at-large concept was thereafter instituted in the primaries. In the case of the School Board, the legislature enacted such a requirement in the very first legislative session after the white primary was struck down, providing for at-large elections for both general and primary elections. Fla. Stat. §§ 230.08, .10 (1977). County commissioners continued to be nominated by district elections until 1954 when the anomaly between single-member district primary elections and at-large general elections was struck

[1]Members of the boards of public instruction were initially, in 1893, elected from single-member districts. There is no explanation for the quick change to at-large elections in 1895.

down by the Florida Supreme Court as contrary to the state's constitution. *Ervin v. Richardson,* 70 So.2d 585 (Fla. 1954).

To bring things up to date, there was a change in 1976 which added to the school board the two seats having no residence requirement. 1976 Fla. Laws, ch. 76-356. The purpose behind this change was avowedly to pack the board to make it more sympathetic to the white majority respecting a racial issue at a local school concerning the use of the nickname "Rebels." The change was in response to a board vote on that issue which coincided with the interests of the black community rather than the white. Although one area legislator stated that the change was unrelated to the school controversy, his testimony was convincingly impeached. Furthermore, evidence, unrefuted, of statements by other legislators shows this was the purpose. One legislator even told a board member he would block the change if the board would reverse its position on the "Rebel" issue. The board did not. It is also interesting to note that board members' salaries were reduced. Although two local civic organizations had been suggesting the change from five to seven members for some time[2] as a counterpart to having an appointed rather than elected school superintendent, the latter proposal was submitted separately for voter approval and was rejected.

In Florida a change from a five to seven-member board usually accompanies a change from elective to appointive superintendent. Yet the two proposals were not submitted to the electorate as a package by the legislative delegation.

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[2]They did so for "good government" reasons, although in so doing they gave no consideration to possible impact on black votes. The racial motivation here was found in the legislative delegation.

The only evidence presented bearing on their reason for not so doing was the "packing" of the board. The board, in challenging the action, urged this contention upon the Supreme Court of Florida. In holding against the board, that court addressed this contention by stating only that "[t]he political motivations of the legislature, if any . . . are not a proper matter of inquiry for this Court." *School Bd. of Escambia County v. Florida,* 353 So.2d 834, 839 (Fla. 1977).

While today in Florida there are some counties having seven-member boards, Escambia County is the only one having both a seven-member board and an elective superintendent.

In a more recent development, the county commissioners have twice, in 1975 and 1977, appointed committees to study the advisability of charter government for the county. Both committees recommended a change to single-member districts. Blacks in the community also argued in favor of the change. The commissioners, however, rejected the change and did not permit the electorate to vote on that provision. The commissioners' decision was unanimous even though one commissioner had served on one of the committees and joined in the recommendation of single-member districts. The commissioners testifying in this case were also unanimous in their rationale. They stated that single-member districts would cause commissioners to cease serving the interests of the county and concern themselves only with their districts.

Like the state, the City of Pensacola adopted the white primary and Jim Crow ordinances in the early 1900's when black voter registration and participation was high. Black registration and participation was, however, steadily reduced until the late 1930's. In 1931, the city adopted the council-manager form of government which is presently in

effect. At that time, when the poll tax and white primary were in effect and blacks were politically impotent, five of the ten councilmen were elected from single-member districts.

Times changed. The poll tax was repealed in 1937, the white primary was abolished in 1945 and black registration made dramatic rises into the 1950's. In 1955 the first black sought office in the Ward 2 single-member district and ran a close race, losing to the incumbent who served as mayor. That election caused concern among members of the council, and in 1956 Ward 2 was gerrymandered to bring in more whites.

By 1959, the council decided to change the election system to require all councilmen to run at-large. The testimony of a former councilman and remarks made by another former councilman indicate that race was a motivating factor in the final decision. The council thus called upon their local state legislators to introduce the change. The change was enacted into law and approved by the electorate that same year. 1959 Fla. Laws, ch. 59-1730.

Plaintiffs challenge the city's election system, along with those of the board of county commissioners and school board, arguing that each dilutes the votes of their respective black electorates. This type voting dilution case has been thoroughly treated by the Fifth Circuit in four recent cases. *Nevett v. Sides, (Nevett II)*, 571 F.2d 209 (5th Cir. 1978); *Bolden v. Mobile,* 571 F.2d 238 (5th Cir. 1978); *B.U.L.L. v. Shreveport,* 571 F.2d 248 (5th Cir. 1978); *NAACP v. Thomas County,* 571 F.2d 257 (5th Cir. 1978).

The court in *Nevett II* restated an earlier mandate that in cases such as this, of "qualitative reapportionment," a district court must consider certain factors set out in *Zimmer v. McKeithen,* 485 F.2d 1297 (5th Cir. 1973) (en

banc), *aff'd sub nom, East Carroll Parish School Bd. v. Marshall,* 424 U.S. 636 (1976). These factors were summarized in *Nevett II* as follows:

> The court in *Zimmer* established two categories, one containing criteria going primarily to the issue of denial of access or dilution, the other containing inquiries as to the existence of certain structural voting devices that may enhance the underlying dilution. The 'primary' factors include: the group's accessibility to political processes (such as the slating of candidates), the responsiveness of representatives to the 'particularized interests' of the group, the weight of the state policy behind at-large districting, and the effect of past discrimination upon the group's participation in the election system. 485 F.2d at 1305. The 'enhancing' factors include: the size of the district; the portion of the vote necessary for election (majority or plurality); where the positions are not contested for individually, the number of candidates for which an elector must vote; and whether candidates must reside in subdistricts.

571 F.2d at 217 (citations omitted).

The court thus makes the following findings of fact under each of the above criteria for the three governmental systems involved in this case:

ACCESSIBILITY

There are no slating organizations which serve to bar blacks from participating in the election systems of the county or city. No impediments are thrown in the way of blacks to register and vote. Active efforts are made to encourage eligible citizens, both black and white, to register

and to vote. The percentage of blacks registering to vote has steadily increased in recent years. Today there is no significant difference between blacks and whites in that respect in the county, although there is in the city. The evidence shows, however, that there are other barriers in each system which effectively operate to preclude access for blacks.

Although blacks constitute 20% of the county's population and 17% of its registered voters, no black has ever been elected under the county's two at-large election systems. Blacks have run time and again, and always lost. Former black candidates claim that they are frustrated and will not run again because blacks cannot win. Their frustration is evidenced by the fact that though several blacks have in the past run for the board of county commissioners, none has sought the office since 1970. Since 1970 blacks have run for the school board, but there they are not faced, as they are with the county commission, with the requirement of a filing fee of approximately $1,000.00. The evidence further shows that the number of blacks seeking both offices in recent years is far lower than one would expect based on their percentage of the population. The fact that they cannot win is evidenced by an analysis of the election returns.

There is in Escambia County a consistent racially polarized or bloc voting pattern which operates to defeat black candidates. There is in the county an active Ku Klux Klan which has run at least one candidate for office and obtained a significant number of votes.[2] More importantly, however, there is an even larger bloc of white voters who, like almost all black voters, consistently vote

[2]The 3,000 votes that candidate received were larger than the margin in which black candidates were defeated in several close races.

for the candidate of their race whenever black candidates face white candidates.

The complete record of county elections since 1955 was brought before the court. The first black person to run for a countywide office was John Reed, who was a candidate for the Escambia County Commission in May, 1966. He failed to make the runoff in the Democratic Primary. The R^2 coefficient of the correlation between Mr. Reed's vote returns and race[3] was 0.98. The first black person to seek election to the Escambia County School Board was Otha Leverette in 1970. Rev. Leverette got the Democratic Party nomination without opposition; no other candidates qualified for this place. Some efforts were made to hide the fact he was black until the qualification date passed. But Leverette was beaten in the general election by a white Republican candidate, Richard Leeper. It was the first time in the modern history of Escambia County that a Republican had won any countywide office. Mr. Leeper received 22,523 votes even though there were at that time only 7,268 Republicans registered. There were 67,297 whites and only 13,037 blacks registered to vote. The R^2 coefficient for the correlation between Leverette's vote and race was 0.76, indicating a severely racially polarized vote. Richard Leeper had received only 10,712 votes in his race against a white Democratic candidate, Kirkland, in the 1966 school board general election.

This pattern of black candidates losing in racially polarized elections continues to the present. Appendices A and B summarize the results of all county commission and school board races in which there was a black candidate,

[3]Percentage of variation in the vote attributable to the race of the registered voters by precinct.

indicating votes received, the number of black and white registered voters and the R^2coefficient for the correlation between percentage of votes received by the black candidate in each precinct and the percentage of blacks among registered voters in each precinct.

These returns and regression statistics were analyzed by political scientists. The analyses focused upon voting returns from precincts which were 95% or more of one race. These returns, combined with regression statistics on all precincts, showed that whenever a black challenges a white for countywide office, a significant majority of the whites who vote will consistently vote for the black's opponent. Sixty percent or more of the whites will do so in most cases. There were some differences in the testimony of plaintiffs' experts and defendants' expert. For example, the defendants' experts' approach to statistical analyses of polarization was somewhat different from that of plaintiffs' expert. Nonetheless, both found racial polarization in most, if not all, elections in which blacks ran.

Even though turnout among black voters is as high as that among white[4] when black candidates run (it is regrettably low for both races), and black voters vote almost unanimously for the black candidates, black candidates cannot attain a majority of the votes in the county because of the numerical inferiority of blacks combined with the white bloc vote. Several prominent white politicians acknowledged this fact.

The situation is much the same respecting the city. Although blacks constitute 33% of the city's population

[4]Voter turnout among blacks is significantly lower when the field or pair of candidates is all white.

and 23% of its registered voters, with two noteworthy exceptions, black candidates have been denied office by the white bloc voting. All city election returns since 1955 were analyzed in the same manner as the countywide returns and again it was shown that most white voters showed consistent preference for white candidates over black candidates resulting in consistent losses and frustration for the minority candidates.

The first time in present memory that a black person sought elective office in the city was 1955 when Charlie Taite ran a close race against Admiral C.P. Mason in a single-member district in what was then Ward 2. In 1963 Dr. Donald Spence, a black dentist, ran for the city council seat designated Ward 4, Group 2. He was the second highest vote getter in the first election, trailing the first place finisher, Soule, by 1,639 votes. There was an extremely high racial polarization of the votes; votes for Dr. Spence correlated with the percentage of blacks registered in each precinct with an R^2 of 0.95. Subsequently, Dr. Spence was defeated by Mr. Soule in a runoff by a margin of 2,829 votes. Black candidates, A.R. Jones and W.R. Hendrieth, were also defeated in at-large voting, without runoffs, in their bids for city council in 1965. Again the voting was highly racially polarized, with R^2's of 0.98 and 0.97 indicating the correlation between the black candidates' votes and race of the registered voters. Appendix C summarizes the results of the city races in which black candidates ran.

There have been only two exceptions to the white bloc vote in city elections. Two blacks, Dr. Spence and Hollice Williams, have been appointed by the council to fill vacant council seats and thereafter were both winners in their bids for reelection. The evidence strongly suggests that the absence of the white bloc vote against these two candidates

is due to the fact that both were chosen and thereafter received public and private white political support. Indeed, one of the two had run for the council prior to his appointment and was then soundly defeated by the usual white bloc vote. This effect of endorsement by community leaders is a common political phenomenon which is called "cuing." *See* V.O. Key *The Responsible Electorate.*

Not all whites vote against blacks. In every race blacks have received some white support. But the city, like the county, is, by and large, a race conscious society. There is an established pattern of sufficient polarized voting to regularly defeat black candidates. White candidates do actively seek the votes of blacks. The studies of voter turnouts indicate, however, that when whites run against whites, black voter turnout drops, indicating a lack of interest by blacks in the candidates. Defendants' expert admitted that this may indicate that blacks view the choice of white candidates as irrelevant to their interests. White solicitation of black votes is not controlling here. As the Fifth Circuit held in *Bolden:* "Although failure of black candidates because of polarized voting is not sufficient to invalidate a plan, . . . it is an indication of lack of access to the political process." 571 F.2d at 243 (citations omitted).

It was shown at trial that access by blacks is further inhibited by filing fees (5% of the salaries of county commissioners and school board members; $50.00 for city councilmen).

RESPONSIVENESS

Plaintiffs were able to show that the county commissioners were unresponsive in two areas. The commissioners have failed to appoint any more than a token

number of blacks to its committees and boards. The black population representing 20% of the county is thus served by an all-white board of commissioners which depends on virtually (95%) all-white advisory panels. A second possible area of unresponsiveness has been housing policy. Special studies have indicated there may be housing discrimination within the county which has been ignored by the commissioners.

By and large, the commissioners were not shown to be unresponsive to the needs of the black community. Their efforts in employment and public recreation were impressive. It was also shown that the commissioners listen to and act upon requests and complaints by blacks. There was no significant discrepancy shown between service to blacks and whites.

The school board was not shown to be unresponsive to the needs of blacks. Its discipline policies were shown to be fair and sensitive to racial concerns. In a severe racially polarized issue involving the use of the nickname "Rebels," the board showed sensitivity to the desires of the black community. No discrimination was shown in administrative appointments.

The city council, like the board of county commissioners, has made a poor showing respecting appointments and housing policy. Only three of the nineteen advisory committees or boards have any black members, though blacks make up 33% of the city's population. Housing discrimination in the city has evoked no response from the council. The council has, however, been shown to be as responsive in providing services for blacks as it does for whites, and the court was impressed with the sincerity of its efforts in the area of employment. The city has investigated and acted upon complaints from the black com-

munity respecting matters such as police brutality. The plaintiffs failed to show that the city council was generally unresponsive to the needs of the black community.

STATE POLICY

The policies behind the at-large systems will be more fully discussed in the court's findings on the intent behind the official action setting up the present election systems. Suffice it to say at this point that the evidence shows a tenuous policy behind the at-large requirement of each system. At-large requirements have been in effect for general elections of county commissioners and school board members since 1901 and 1895, respectively. However, in the primaries, which were then tantamount to election, the commissioners were elected in single-member districts from 1907 to 1954, and school board members from 1907 to 1947. Half the city council was elected from single-member districts until 1959. Moreover, the evidence shows, as will be more fully developed in the court's findings on intent, that there were racial motivations connected with the at-large requirements of each of these election systems.

PAST DISCRIMINATION

State enforced segregation and discrimination have helped create two societies in the city and county – segregated churches, clubs, neighborhoods and, until a few years ago, schools. These laws left blacks in an inferior social and economic position, with generally inferior education. The lingering effects upon black individuals, coupled with their continued separation from the dominant white society, have helped reduce black voting strength and participation in government. Past

discrimination has helped create bloc voting, a failure of white candidates to arouse interest among blacks and a failure of the city and county governing bodies to appoint blacks to advisory committees and boards. In explaining his failure to appoint blacks to such advisory bodies, the former city mayor stated that the qualified black members of the community were not as visible to him as were the white members. Another white former city council member referred to the black and white communities as the black and white "sides of the fence." That fence, largely the result of past discrimination, is a basic cause or contributing factor to the fundamental problems involved in this suit. The racially polarized voting patterns, resulting from the prior state enforced segregation of the races, and the separate white and black societies it left behind, continue to exist.

ENHANCING FACTORS

Both the city and county are large election districts. The city has a projected population of over 62,000 for 1980. The county's projected population for that year is over 269,000, and it is geographically large (657 square miles, fifty-one miles in length).

There is no majority vote requirement in the general elections for county commissioners and school board members. There is, however, a majority requirement in the primaries. *See White v. Register,* 412 U.S. 755 (1973). Moreover, as a practical matter, no one has in recent history won a general election without a majority. There is a formal majority requirement for city councilmen.

There is no anti-single-shot requirement in the three election systems, but candidates do run for numbered places. This means that blacks are always pitted in head-

on-head races with white candidates, and that the black community cannot concentrate its votes in a large field of candidates.

There are residency requirements for all county commissioners, five of the seven school board members and all city councilmen.

THE AGGREGATE

The court in *Nevett II* restated the basic principle that the findings under the *Zimmer* factors must be weighed and that they must point to dilution "in the aggregate" to support such a finding. 571 F.2d at 217, citing *Hendrix v. Joseph,* 559 F.2d 1265 (5th Cir. 1977); *David v. Garrison,* 553 F.2d 923, 929 (5th Cir. 1977); *Nevett v. Sides,* 533 F.2d 1361, 1365 (5th Cir. 1976); *Zimmer,* 485 F.2d at 1305.

The findings under the factors are in summary form as follows:

(1) Blacks are denied access to the political processes of the county and city because of the interaction of the polarized voting patterns with each of the present at-large election systems. Blacks are further frustrated by the filing fee requirements of the three systems.

(2) The three governmental units have been generally responsive to the needs of the black community. Though two were lacking in appointments of blacks to advisory boards and committees, and in housing policies, the systems cannot, on the whole, be found unresponsive.

(3) The state and city policies behind the at-large requirement are tenuous and to some degree rooted in an intent to discriminate.

(4) Past discrimination has created barriers to the full participation of blacks in the present political processes.

(5) The problems faced by blacks seeking access to the political processes are enhanced by the size or the at-large districts involved, the practical necessity or legal requirements of getting a majority vote to be elected, and the requirement that candidates run in numbered places.

When weighed together, all these factors demonstrate a dilution of black voting strength. The finding of general responsiveness of each governmental entity does not foreclose this conclusion. The court in *Nevett II*, 571 F.2d at 223 and in the *Shreveport* case, 571 F.2d at 254, did stress the importance of that factor in the context of inferring intentional discrimination in the maintenance of the at-large system. If such intent is to be inferred in the operation of the system, it is clear that responsiveness is a key indicator. The effect of dilution, however, may exist apart from the unresponsiveness of politicians. In the *Zimmer* case, dilution was found even though there was no proof of unresponsiveness.[5] 485 F.2d 1306-07. The Fifth Circuit has not held, as defendants contend, that the purpose of the *Zimmer* test is to measure the necessity of official unresponsiveness to black concerns or that dilu-

[5]This court does not read footnote 26 to mean that if it can be measured, unresponsiveness must be proved to establish dilution. 485 F.2d at 1306-07. The court in *Zimmer* did find that the absence of proof as to unresponsiveness might be explained by the type functions performed by the police jury (though not in the case of the school board). The Fifth Circuit also, however, reached a general conclusion that the absence of unresponsiveness could not foreclose a finding of unconstitutional voting dilution. *Id.* This general holding was reaffirmed by the court in *McGill v. Gadsden County Commission*, 535 F.2d 277, 280 n. 7 (5th Cir. 1976).

tion cannot be found unless elected officials are free to ignore the needs of blacks. Although the elected officials in this case generally desire and actively seek the black vote and are generally responsive to grievances aired by black citizens, dilution is evident. This is so because the *Zimmer* criteria ultimately measure not the responsiveness of the politicians, but the responsiveness of the entire political system. Blacks have shown a consistent and near unanimous voting preference for black candidates and have shown a lack of interest in races between white candidates. The effects of past discrimination such as lower registration, inferior socioeconomic status and especially racially polarized voting, when combined with the at-large system and attendant barriers such as filing fees, large districts, majority vote requirements and numbered place ballots, have effectively stifled that strong preference. Although elected officials have been responsive, these factors show, in the aggregate, that the voting strength of blacks is effectively diluted under the present election systems of the county and city.[6]

In addition, the evidence showed blacks to be severely underrepresented in advisory panels of the county commissioners and city council. The *Zimmer* factors are not exclusive in voting dilution cases, *Nevett II*, 571 F.2d at 224; quoting *Kirksey v. Board of Supervisors*, 554 F.2d 139 (5th Cir.) (en banc), *cert. denied*, ____ U.S.____, 920 S.Ct. 412 (1977), and the lack of black appointees has independent significance in this case because of the absence or near absence of blacks in elected positions. With such a

[6]The state policy criterion was not of major significance in this finding of the effect of dilution. It is, however, probative of intent to discriminate, *Nevett II*, 571 F.2d at 224, and is a part of the court's analysis of that issue.

paucity of black elected and appointed representatives, blacks are excluded from almost all positions of responsibility in the governmental policymaking machinery. Although it is not necessary to the finding of dilution in this case, the court finds that the lack of black appointees exacerbates the inability of blacks to participate fully in the political process and is further evidence of dilution.

The finding of dilution on the part of the city's election system is not weakened by the fact that two blacks have been elected to the council. The court in *Zimmer* held that election of blacks did not necessarily indicate access to the system. 485 F.2d at 1307. The court noted that the circumstances of particular elections might indicate other factors at work. *Id.* In the case of the city, the only blacks who were elected were two men previously appointed and publicly endorsed by the white city leaders. That the white political establishment can at times choose a black man of its own liking and help get him elected certainly does not indicate that black votes are not diluted. Such access as may be given or taken away by the white politicians is not a real access to the political system which is possessed by the black community. *See id.; Graves v. Barnes,* 343 F. Supp. 704, 726 (W.D. Tex. 1972). Though the adoption of blacks by the city council and white establishment was well intentioned,[7] the resulting appearance of access by blacks is a facade which cannot hide the impotence of black voters in electing candidates of their choice.

INTENT

An at-large election system which operates to dilute the vote of black citizens is not necessarily violative of the Constitution. It must also be shown that discriminatory

[7]The testimony at trial in this respect was convincing to this court.

intent was a motivating factor in the enactment of the system or is a motivation in the present maintenance of the system. *Nevett II,* 571 F.2d at 222. Discriminatory intent in the enactment is proved by the criteria set down in *Arlington Heights v. Metropolitan Housing Corp.* 429 U.S. 252, 266-68 (1977). Invidious purposes in the maintenance of the system are proved by the circumstances surrounding the operation of the system and may be inferred from findings under the *Zimmer* factors. *Nevett II,* 571 F.2d at 222.

In *Arlington Heights* the Supreme Court set out several factors indicative of discriminatory intent. They are (1) the effect of the official action, (2) the historical background of the decision, "particularly if it reveals a series of official actions taken for invidious purposes," (3) the sequence of events, (4) substantive and procedural departures, (5) legislative history. 429 U.S. at 266-68. These criteria must be applied to the official act or acts which give rise to the respective election systems in this case.

The at-large requirements of the election system (both general election and primaries) of the board of county commissioners are based on the 1901 amendment to the Florida Constitution. Fla. Const., art. 8, § 5. The historical background of the 1901 amendment includes a general pattern of disenfranchisement and other discrimination at the hands of the state. The other laws of the period relating to selection of commissioners – gubernatorial appointment prior to 1901 and single-member district white primary after 1907 – were clearly race related. The Jim Crow laws were also being instituted in the early 1900's. The sequence of testified that in Pensacola black registration was high in 1900, and it was only thereafter that they were effectively excluded from the political process.

Despite this evidence indicating racial motivation in the 1901 amendment, the conclusion of the Fifth Circuit in *McGill* was reinforced by the conclusions drawn by plaintiffs' own expert historian, Dr. Shofner. For this reason, the holdings of *McGill* should not be disturbed and no discriminatory intent can be found as a motivating factor behind the 1901 amendment.[8]

The present election system of the school board, involving an at-large requirement in both general and primary elections, was enacted by statute in 1947. Fla. Stat.§§ 230.08, .10 (1975). The history and sequence of events strongly suggest racial motivations. From 1907 until 1945 the white primary was in effect. This was a period in which the Jim Crow laws were also in effect and in which the white government was unwilling or unable to prevent a shocking degree of violence and intimidation suffered by blacks at the hands of whites. The state policy of excluding blacks from the primary election was finally declared unconstitutional in *Davis v. State ex rel. Cromwell,* 156 Fla. 181, 23 So.2d 85 (1945). Then in the very first legislative session following the decision, the legislature enacted statutes providing for an at-large requirement in both the general election, 1947 Fla. Laws, ch. 23726, § 9, and the primaries, 1947 Fla. Laws, ch. 23726, § 7. This marked a major substantive change from a system in which all members had been elected from single-member districts in the primaries, which were tantamount to election. The effect of the change was to prevent blacks from running in single-member district primaries which had existed up until that time. It was the testimony of

[8]Though it may have been acting in a race-proof situation in 1091, there is little chance that the legislature would have created single-member districts if blacks could have been elected in them. *See Bolden v. Mobile,* 423 F.Supp. 397 (S.D. Ala. 1976).

plaintiffs' expert historian that the 1947 election system resulted from racial motivations. The evidence of discriminatory motives behind the at-large requirements of the 1947 system is compelling. The court finds that racial motivations were a main force behind the enactment in 1947 of the current at-large election system.

The present council-manager form of government, adopted in 1931, originally provided for five of the ten councilmen to run in single-member districts. Prior to 1931, Pensacola, like most other southern cities, had adopted the white primary and Jim Crow ordinances. In the 1940's and 50's, however, black voter registration made dramatic increases and apprehension about black voting strength was voiced in the community. In 1955 a black man ran a close race against the mayor in one of the single-member districts. In 1956, that district was gerrymandered to bring in more whites. A former councilman who served at that time said the gerrymander was for racial purposes. In 1959 the council requested the area legislators to initiate legislation to make all seats on the council elected at-large. The former councilman again testified that the council's motivations were racial. It was also related that in presenting the proposed change to the area legislators, another former councilman stated that "a salt and pepper council" was not wanted. The legislation was passed that year. 1959 Fla. Laws, ch. 59-1730. When the new system was placed before the voters, the newspaper stated that the "prime" reason for the proposed change was to prevent blacks from being elected. It is clear from the testimony of Governor Reubin Askew, then a member of the Escambia County legislative delegation which presented the legislation, that racial motivation played no part in the legislature's enactment, and that he did not believe at the time race was really a factor in the proposed change.

Governor Askew did not, of course, have the benefit of all the testimony before this court. Race was not a factor in the advocacy of the change by such organizations as the Pensacola Chamber of Commerce and the League of Women Voters. But it was a factor in the recommendation of the council for the change. Governor Askew testified that it was then the practice of the local legislative delegation to enact legislation concerning city government only if the measure was unanimously approved and proposed to the delegation by the city council.

The conclusion of plaintiffs' expert historian that race was a concurrent motivating factor in the 1959 change is inescapable.[9] A preponderance of the evidence shows that race was a motivating factor.

In the case of the city, as with the school board, racial motivation was not the only factor behind the change. The existence of other motivation is not controlling.

The Supreme Court stated in *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 265 (1976):

> *Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one. In fact, it is because legislators and administrators are properly concerned with

[9]The fact that the showing of racial motivation is largely focused upon the city council and not the legislators who voted on the proposal is not controlling. Changes in local government were accomplished in a three step process – resolution by the city government, legislative proposal, ratification by the electorate. Discriminatory intent at any stage infects the entire process.

> balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.

Discriminatory intent in the maintenance of the at-large requirement of the election systems, though often more difficult to prove, may be shown by circumstantial evidence. It may be inferred from the aggregate of the *Zimmer* factors.

Thus, an inference of intent may be raised. A finding of unresponsiveness is of "momentous" importance in inferring a present intent. *B.U.L.L. v. Shreveport,* 571 F.2d at 254. Unresponsiveness has not been found in any of the three systems. Such does not, however, preclude a finding of present discriminatory intent in maintenance.

There is other circumstantial evidence surrounding the present maintenance of the at-large requirement in the election of county commissioners and school board members.

The county commissioners' two charter government committees, appointed in 1975 and 1977, both unanimously recommended a change to single-member districts. Ignoring the expressed concerns of the black voters and the recommendations of both study committees, however, the county commissioners struck the single-member districts from the charter referendum. The electorate was not given the opportunity to decide on the election changes; the charter referendum was defeated.

The four county commissioners testifying at trial all

claimed that they struck single-member district elections from the proposal for reasons unrelated to race. Each said it was his personal belief that all of the voters of the county should be allowed to vote on each of the commissioners because they felt that the at-large requirement made the board more responsive to the needs of the community. No one of them gave any other reason, and none expressed any concern about the effect the change would have on the opportunities of candidates preferred by blacks.

One commissioner expressed the opinion that commissioners elected solely by the voters of their districts would not have to be fair in the apportionment of funds to other districts. But he could not explain how this result would necessarily occur when the commissioners were sworn to represent the interests of the whole county.

One of their members had served on one of these committees and agreed in the report submitted with the recommendation for single-member districts. Yet when the report went to the commission he changed his position and voted against it. He gave no adequate explanation of why he changed his position.

The testimony also showed that the residence district of each commissioner is more or less regarded at the district of that commissioner for which he has responsibility and for whose needs he is the particular advocate on the commission. As an example of the commission's practice, road funds are arbitrarily allocated with 20% going to each residence district, and the individual members with greater needs for their particular districts must convince other commissioners to give up parts of their shares. No testimony was presented showing why the commission, representing the county at-large, did not initially itself try as a body to spend road funds where needed in the county

without regard to residence districts. Their expressed concern about countywide elections and representation does not stand foursquare with the present operation of the commission and its business.

In their post-trial memorandum, defendants admit that the rejection of the single-member district aspect of the charter proposal "reflects the commissioners' desire to maintain their incumbency." This was also the court's impression at trial. Each of these commissioners had been elected in countywide elections. They could not know how they would fare in single district elections. Yet it is apparent that in such elections one or more of them might be replaced by blacks.

To this court the reasonable inference to be drawn from their actions in retaining at-large districts is that they were motivated, at least in part, by the possibility single district elections might result in one or more of them being displaced in subsequent elections by blacks.[10]

This conclusion is bolstered by the findings under the *Zimmer* factors that black voting preferences for blacks cannot be registered in the present system and black candidates are otherwise denied access to that system. That their motivations may be selfish rather than malicious toward blacks does not alter the conclusion that their intent was to continue the present dilution of black voting strength. The present at-large election system for county commissioners is being maintained for discriminatory purposes.

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[10]It was stipulated that a fairly constructed single-member district system for the election of Escambia County Commissioners and Escambia County School Board members would produce one black majority county commission and school board district each out of five.

The 1976 change in the school board's election system was avowedly to pack the board to make it more responsive to the white majority on a particular racially polarized issue. The evidence showed that the seven member proposal was used as a threat by area legislators who knew that the white majority would have its way at the polls. This is a telling indication of the legislators' and community's recognition and use of the at-large system as a method of rendering black voters politically impotent to the desires of the white majority. This action by the legislators, in conjunction with this court's findings under the *Zimmer* factors, shows that the present at-large system of electing school board members is being maintained, at least in part, by racially discriminatory motives.

This court cannot find, based on the evidence before it, that the city presently maintains its at-large system for discriminatory purposes. The lack of access, the tenuous policy, the present effects of past discrimination and the enhancing factors afford room for inference of such present discriminatory maintenance as they do with the commission and school board. With the city, however, there is no recent racially motivated action corroborating and supporting a finding of present racially motivated maintenance as there is with the commission and school board. Based on the evidence here presented, without a finding of unresponsiveness, and with no evidence justifying or corroborating an inference of intent drawn from the *Zimmer* factors, the court cannot find that the city's at-large system is presently intentionally maintained as a vehicle for racial discrimination.

In sum, a preponderance of the evidence shows that the election system of the board of county commissioners effectively dilutes the votes of black citizens. Though the court does not conclude that the system was enacted for

invidious purposes, the evidence does show that it is being maintained at least in part for discriminatory reasons. Thus, the present election system violates the fourteenth and fifteenth amendments.

The evidence shows that the election system of the school board dilutes the votes of black citizens. The court finds discriminatory intent in both the enactment and maintenance of the present system. That system violates the fourteenth and fifteenth amendments.

Insofar as the city council is concerned, there is no current evidence respecting the present maintenance of the system such as there is with the commission and the school board. However, the present election system of the city council has been shown to have the present effect of diluting the votes of black citizens. As pointed out previously, racial motivations played a part in the change to a uniform at-large requirement. The system violates the fourteenth and fifteenth amendments.

This court is cognizant of the general principle that federal courts should avoid decision on constitutional grounds if adequate statutory grounds are available. In *Bolden v. Mobile,* 571 F.2d 238 (5th Cir. 1978), the court, in its footnote 3, page 242, pointed out that the statutory claim here at best is problematic. This court concludes, as did the court in *Parnell v. Rapides Parish School Bd.,* 425 F.Supp. 399 (W.D. La. 1976), that the interest of judicial economy and the need for prompt final resolution dictate that the court here reach the constitutional questions. As the footnote in *Bolden* points out, under similar circumstances, the Supreme Court has avoided an abusive application of the constitutional-decision-avoidance rule.

Plaintiffs also seek relief under the Civil Rights Act of

1970, 42 U.S.C. 1971(a)(1) and under the Voting Rights Act of 1965, 42 U.S.C. § 1973.

Throughout this litigation the parties to this litigation have provided this court with well prepared and thorough legal memoranda. Influenced perhaps, however, by the *Bolden* court's treatment of a similar situation, 571 F.2d at 242 n. 3, they have provided this court with no memoranda addressed to these statutory claims. As the appellate court pointed out in that footnote, the statutory claim is at best problematic. Like the appellate court, this court knows of no successful dilution claim expressly founded on 42 U.S.C. § 1973. Judge Wisdom, in his concurring opinion in *Nevett II,* appeared to have no doubt of its application and discussed the question whether intent was a necessary element of a claim under the statute.

The plaintiffs here have not established a claim for relief under the Civil Rights Act of 1870, 42 U.S.C. § 1971(a)(1). That section concerns itself only with the entitlement to cast one's vote at elections, and such is not presented in this voting dilution suit.

Respecting 42 U.S.C. § 1973, the court concludes that the plaintiffs have established claims for relief under this section. This section, passed to carry out the purpose of the fifteenth amendment, tracks its language in respect to denial or abridgement of the right to vote on account of race.

The findings in this case which constitute violations of fifteenth amendment must also constitute violations of this statute. The right to vote protected by the statute has, like that of the fifteenth amendment, been given a broad meaning. *Allen v. State Bd. of Elections,* 393 U.S. 544 (1969).

Inasmuch as the court has found the evidence of intent in its consideration of the constitutional questions involved, it need not and does not decide whether proof of intent is required under 42 U.S.C. § 1973.

IN SUMMATION

Florida, like other southern states, has a long historical background of black race discrimination in its government. The demise of its poll tax and other Jim Crow laws and of its white primary served as catalysts in impelling it toward a society organized and governing itself as one free of racial motivations. More importantly, there has been, particularly in more recent years, a growing awareness among many responsible white citizens that race discrimination not only has no place in the ongoing progress of the government of our nation, but that improving the lot of the disadvantaged portion of the nation in the long run will benefit all the nation.

That has happened here. Escambia County and Pensacola have come a long way in the past twenty-five or thirty years. But discrimination against blacks, stemming from long years of conscious and deliberate oppression and discrimination against blacks by whites, does not disappear quickly. It is a gradual and ongoing process, and the process is still going on here. The race discrimination that was so manifest in the earlier years in this state, and in this county and city, though diminished, has not yet disappeared.

Because this county and this city have made so much progress in complying with the commands of the Constitution and the law in these recent years, this case is not an easy one to decide.

The conclusion impelled and reached is that at least the preponderance – though not an overwhelming preponderance – of the evidence supports plaintiffs' contentions so that judgment must be entered for them.

One day, hopefully, the time will come in our nation's ongoing progress when we as a people, or at least a sufficient number of us, have so eliminated race consciousness and discrimination from our hearts and minds that such is not reflected in governmental processes and procedures. Then there will be no need for suits such as these. Then there will be no justification for orders such as the ones entered here that interfere with the right of the people to establish for themselves the details of their government because, in doing so, they themselves will have complied with constitutional and legal requirements. As it has not in so many other places in our nation, that day has not yet come to Escambia County and to Pensacola.

REMEDY

The Supreme Court of the United States has laid down the general principle that "when district courts are forced to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter." *Conner v. Johnson,* 402 U.S. 690 (1971); *see also East Carroll Parish School Bd. v. Marshall,* 424 U.S. 636 (1976); and *Wallace v. House,* 425 U.S. 947 (1976). In approving single-member districts as a remedy for unconstitutional dilution, even where such a reapportionment required a complete change in a form of government from a city commission to a mayor-council, the Fifth Circuit has reminded the district courts of these principles laid down in their cases.

The Fifth Circuit in *Bolden* stated:

> The district courts have been repeatedly admonished by the Supreme Court to avoid the employment of at-large seats in their remedial plans, unless some special circumstance required that such seats be used.

571 F.2d at 246.

However, these pronouncements of Fifth Circuit antedated the Supreme Court's opinion in *Wise v. Lipscomb*, ____ U.S. ____, 46 U.S.L.W. 4777 (June 22, 1978). In that case it was pointed out that the plan presented by the city was legislative and was not to be viewed as judicial. It distinguished the case from the *East Carroll Parish School Board* case by pointing out that the Dallas City Council validly met its responsibility of replacing the invalid apportionment provision with one which could survive constitutional scrutiny.

Under the holding of the case, when an existing apportionment scheme has been declared to be unconstitutional, it is appropriate whenever practicable to afford a reasonable opportunity for the legislative body itself to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan.

Unlike the situation presented in *East Carroll Parish School Board,* Escambia County and the City of Pensacola have not been brought under the Voting Rights Act of 1965 so that approval of the Attorney General must be obtained for any such legislative changes. Moreover, unlike the situation presented in other cases, the defendants in these cases are ready and willing to assume the responsibility of providing what they believe will be an effective remedy for the dilution found by this court to exist.

In each of these cases the judgments to be entered will require the parties within 45 days after date thereof to submit proposals that they believe provide an effective remedy for the dilution found by this court to exist.

The plaintiffs' claims for attorneys' fees in each of these cases will be determined after a hearing on these issues.

The judgments to be entered will retain jurisdiction for all necessary and proper purposes.

The court concludes that the shortness of time renders it impracticable for the remedial systems, yet to be presented and approved, to be used in the September, 1978 primary election and the subsequent general election this year for the county commission and the school board.

These remedial systems should therefore become effective for the next ensuing primary and general elections which will occur in the year 1980.

There is yet another reason why such remedial systems should not become effective until 1980 insofar as the members of the county commission and the school board are concerned.

The defendant officeholders on such commission and board have each been elected for specific four year terms of office. They were elected prior to institution of this suit, and neither they nor those electing them could reasonably have foreseen this decision. It is reasonable and proper that they should be allowed to finish out the terms for which they were elected.

This does not mean that any elected after this date shall also be allowed to finish out their elected terms. Any candidates seeking election after this date for any of the offices involved may reasonably be considered to have notice

of this decision and of the possibility that because of it the terms to which they are elected may be cut short.

There are some of the defendant county commissioners and school board members whose elected terms will expire this year. However, there are also members serving on both these boards whose elected terms will not expire until the 1980 elections. Postponing the effective date of the remedial systems until 1980 will allow all of these office-holders now serving to finish out the terms for which they were elected.

Inasmuch as the next Pensacola City Council election is in May of 1979, at which time all terms expire, the changes approved by this court could become effective in time for those elections without disturbing or shortening the terms for which present councilmen are elected. Thus the remedial system to be employed insofar as the city council is concerned should become effective in time for its employment in the May, 1979 city council election.

This court believes that the judgments entered will be final judgments from which appeals may be taken. However, in the event such would not be considered an appealable judgment, the court will of its own motion, pursuant to 28 U.S.C. § 1292(b), include in each judgment a finding that the judgment entered involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate determination of the litigation.

DATED this 10 day of July, 1978.

/s/ Winston E. Arnow

WINSTON E. ARNOW
Chief Judge

APPENDIX A
Summary of Black Candidacies in County Commission Elections

		Votes	No. Bs. regis.	No. Ws. regis.	R^2 for race
	1966: 1st Primary District 2				
	Cobb	14,592			
	Fredrickson	9,017			
(B)	Reed	8,225	13,250	55,754	0.98
	Ward	4,298			
	1968: 1st Primary District 5				
	Armour	19,168			
	Gindl	8,159			
(B)	Jenkins	9,704	13,214	60,650	0.95
	Whatley	4,901			
	Runoff District 5				
	Armour	24,408			
(B)	Jenkins	14,636	13,214	60,650	0.91
	1970: 1st Primary District 4				
	Davis	8,658			
(B)	Dedmond	7,373	13,037*	67,297*	
	Kenney	19,700			0.85
	District 2				
	Barnes	11,840			
	Cobb	9,557			
	Kelson	9,037			
(B)	Reed	5,240	13,037*	67,297*	

*Includes Republicans and Independents. Total Democrats were 71,803.

APPENDIX B

Summary of Black Candidacies in School Board Elections

		Votes	No. Bs. regis.	No. Ws. regis.	R^2 for race
	1970: General Election				
	Place 4				
	Leeper	22,523			
(B)	Leverette	21,065	13,037	67,297	0.76
	1974: 1st Primary				
	Place 3				
(B)	Jenkins	12,275	13,836	65,129	0.77
	Sanders	10,933			
	General Election				
	Place 3				
(B)	Jenkins	21,098	14,207	79,208	0.87
	Leeper	22,547			
	Place 1				
	Bell	32,612			
(B)	Stallworth	9,673	14,207	79,208	0.69
	1976: 1st Primary				
	Place 4				
	Marshall	16,079			
(B)	Spence	15,956	15,441	85,595	0.91
	Smith	10,717			

	Place 7				
	Bailey	9,765			
	Forester	5,244			
(B)	Jenkins	12,257	15,441	85,595	0.95
	King	1,362			
	Lee	5,606			
	MacGill	5,071			
	Southhard	1,173			
	Runoff				
	Place 4				
	Marshall	29,106			
(B)	Spence	19,176	15,441	86,595	0.91
	Place 7				
	Bailey	26,786			
(B)	Jenkins	20,526	15,441	85,595	0.87

APPENDIX C

Summary of Black Candidacies in City Elections

	Votes	No. Bs. regis.	No. Ws. regis.	R^2 for race
1955: Ward 2				
(B) Charlie L. Taite	765			
C.P. Mason	925			
	1,690			
1963: Ward 4 Group 2				
Booker	851			
Gonzales	1,075	(May 1964)		
Soule	4,717			
(B) Spence	3,078	6,426	19,427	0.95
Tennant	2,045			
	11,766 (45.5%)			
Runoff				
Soule	7,055			
(B) Spence	4,226			
	11,281 (43.6%)			
1965: Ward 2 Group 2				
A.D. Bowman	7,771	(Oct. 1966)		
B.J. Godwin	553			
(B) A.R. Jones	2,740	7,578	17,613	0.98
C.S. Jones, Jr.	3,302			
	14,366 (57.0%)			

	Ward 3				
	Group 1				
(B)	W.F. Hendrith	1,877			0.97
	E.J. Johnston	4,084			
	R.G. MacDonald	4,519			
		10,480 (41.6%)			
	1967: Ward 3				
	Group 2				
	J.E. Frenkel, Jr.	6,808	(April 1968)		
(B)	William F. Hendrieth	3,020	7,177	20,784	0.84
		9,828 (35.1%)			
	1969: Ward 2				
	Group 1				
	Eugene P. Elebash	6,277	(Oct. 1968)		
(B)	William H. Marshall	3,832	5,659	19,470	0.77
		10,109 (40.2%)			
	Ward 3				
	Group 2				
	John E. Frenkel				
(B)	William F. Hendrith	2,120			0.84
	Ward E. King	2,071			
		4,191 (16.7%)			
	1971: Ward 2				
	Group 1				
	Robert Brockett, Jr.	5,233	(Aug. 1970)		
	Robert A. Craighead	400			
(B)	William H. Marshall	2,677	6,795	21,543	0.92
		8,310 (29.3%)			

	Ward 2 Group 2				
(B)	William F. Hendreith	2,008			0.96
	J.J. Alfred	2,286			
	William H. Northrup	3,837			
	Rodney C. Jones	330			
	1971: Ward 3 Group 2				
	John E. Frenkel, Jr.	6,108			0.89
(B)	F.L. Henderson	2,270			
	Ward 5 Group 2				
(B)	Hollice T. Williams	6,225			0.62
	J.C. Adams	1,670			
	Charles Van Wilson	895			
	1973: Ward 3 Group 1		(Oct. 1972)		
(B)	Orellia F. Benjamin	2,334	7,680	26,568	
	W.J. Paulk	2,873			
	Ward 5 Group 2				
(B)	Hollice Williams	Unopposed			
	1975: Ward 4 Group 2				
(B)	Dr. Donald Spence	4,308			0.82
	Robert Gilmore	3,102			
	Ward 5 Group 1				
	Dr. V. Paul Bruno	5,387			0.86
(B)	James L. Brewer	1,824			

Ward 5				
Group 2				0.67
(B) Hollice Williams	5,093			
Sal Ferraro	893			
Chuck Porter	1,599			
1977: Ward 2				
Group 1				
Ann Belleau	2,874			
Rick Fountain	1,455			
Franklin Pryor	2,737			
(B) William Hendreith	1,061	9,245	25,569	0.79
Ward 5				
Group 1				
Mike Bass	4,271			0.82
(B) Ruby Gainer	3,985			
Ward 5				
Group 2				
(B) Hollice Williams	Unopposed			

b. Judgment.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

HENRY T. McMILLAN, et al.,
Plaintiffs,
vs. PCA No. 77-0432

ESCAMBIA COUNTY, FLORIDA,
et al.,
Defendants.

JUDGMENT

Pursuant to and in accordance with Memorandum Decision of this date, it is,

ORDERED AND ADJUDGED as follows:

1. Judgment is hereby entered in favor of the plaintiffs and against the defendants, with costs taxed against the defendants.

2. Within 45 days after this date, the parties will submit proposals that they believe provide an effective remedy for the dilution found by this court to exist.

3. The remedial systems, as finally approved and adopted by this court, shall not be effective for the primary and general elections occurring in 1978, but shall become effective for the next ensuing primary and general elections which will occur in the year 1980.

4. This court retains jurisdiction for all necessary or proper purposes, including but not limited to determina-

tion of the plaintiffs' claims for attorneys' fees after hearing thereon.

5. Pursuant to 28 U.S.C. § 1292(b), the court finds that the judgment here entered involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate decision of the litigation.

DONE AND ORDERED this 10 day of July, 1978.

/s/ Winston E. Arnow

WINSTON E. ARNOW
Chief Judge

APPENDIX C

Judgment in, and Order Denying Appellants' Suggestion of Rehearing En Banc of, *McMillan v. Escambia County*, Florida, 688 F.2d 960 (5th Cir. 1982).

1. Judgment.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

UNIT B

No. 78-3507
80-5011

D.C. Docket No. PCA 77-0432

HENRY T. McMILLAN, ET AL.,
Plaintiffs-Appellees,

vs. PCA No. 77-0432

ESCAMBIA COUNTY, FLORIDA,
ET AL.,
Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Florida

Before COLEMAN, PECK** and KRAVITCH, Circuit Judges.

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*Former Fifth Circuit case, Sec. 9(1) of Public Law 96-452 – Oct. 14, 1980.

**Honorable John W. Peck, U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

This cause came on to be heard on plaintiffs-appellees' petition for rehearing;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the opinion originally entered by this Court on February 19, 1981 is VACATED in No. 78-3507 concerning the County Commission, and VACATED entirely in No. 80-5011; and the judgment of the said District Court appealed from is AFFIRMED; and that this cause be, and the same is hereby REMANDED to said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellants pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

September 24, 1982

ISSUED AS MANDATE: NOV. 23, 1982

2. Order.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

No. 78-3507
No. 80-5011

HENRY T. McMILLAN, ET AL.,
Plaintiffs-Appellees,

versus

ESCAMBIA COUNTY, FLORIDA, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Florida

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion SEPTEMBER 24, 5 Cir., 1982, ____ F.2d ____). (NOV 4 1982)

Before COLEMAN, PECK** and KRAVITCH, Circuit Judges.

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*Former Fifth Circuit case, Section 9(1) of Public Law 96-452-Oct. 14, 1980.

**Honorable John W. Peck, U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

PER CURIAM:

(✔) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the Petition for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the Petition for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch

United States Circuit Judge

APPENDIX D

Notice of Appeal of *McMillan v. Escambia County, Florida*, 688 F.2d 960 (5th Cir. 1982).

No. 78-3507
No. 78-5011

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

HENRY T. McMILLAN, *et al.*,
Plaintiffs-Appellees,

v.

ESCAMBIA COUNTY, Florida, *et al.*,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN DISTRICT OF
FLORIDA

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that defendants-appellants Escambia County, Florida, the members of its Board of County Commissioners and the Supervisor of Elections hereby appeal to the Supreme Court of the United States the September 24, 1982 decision by this Court in the above-captioned action. The suggestion by defendants-appellants of rehearing en banc was denied by the Court on November 4, 1982.

This appeal is taken pursuant to 28 U.S.C. § 1254(2) (1976).

Respectfully submitted,

/s/ Charles S. Rhyne

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Counsel for Defendants-Appellants

APPENDIX E

Constitutional and Statutory Provisions

1. U.S. Const. amend. XIV, § 1.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Fla. Const. art. VIII, § 1.

ARTICLE VIII – LOCAL GOVERNMENT

§ 1. Counties

(a) *Political subdivisions.* The state shall be divided by law into political subdivisions called counties. Counties may be created, abolished or changed by law, with provision for payment or apportionment of the public debt.

(b) *County funds.* The care, custody and method of disbursing county funds shall be provided by general law.

(c) *Government.* Pursuant to general or special law, a county government may be established by charter which shall be adopted, amended or repealed only upon vote of the electors of the county in a special election called for that purpose.

(d) *County officers.* There shall be elected by the electors of each county, for terms of four years, a sheriff, a tax collector, a property appraiser, a supervisor of elections, and a clerk of the circuit court; except when provided by county charter or special law approved by vote of the electors of the county, any county officer may be chosen in another manner therein specified, or any county office may be abolished when all the duties of the office prescribed by general law are transferred to another office. When not otherwise provided by county charter or special law approved by vote of the electors, the clerk of the circuit court shall be ex officio clerk of the board of county commissioners, auditor, recorder and custodian of all county funds.

(e) *Commissioners.* Except when otherwise provided by county charter, the governing body of each county shall be a board of county commissioners composed of five members serving staggered terms of four years. After each

decennial census the board of county commissioners shall divide the county into districts of contiguous territory as nearly equal in population as practicable. One commissioner residing in each district shall be elected by the electors of the county.

(f) *Non-charter government.* Counties not operating under county charters shall have such power of self-government as is provided by general or special law. The board of county commissioners of a county not operating under a charter may enact, in a manner prescribed by general law, county ordinances not inconsistent with general or special law, but an ordinance in conflict with a municipal ordinance shall not be effective within the municipality to the extent of such conflict.

(g) *Charter government.* Counties operating under county charters shall have all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors. The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law. The charter shall provide which shall prevail in the event of conflict between county and municipal ordinances.

(h) *Taxes; limitation.* Property situate within municipalities shall not be subject to taxation for services rendered by the county exclusively for the benefit of the property or residents in unincorporated areas.

(i) *County ordinances.* Each county ordinance shall be filed with the secretary of state and shall become effective at such time thereafter as is provided by general law.

(j) *Violation of ordinances.* Persons violating county ordinances shall be prosecuted and punished as provided by law.

(k) *County seat.* In every county there shall be a county seat at which shall be located the principal offices and permanent records of all county officers. The county seat may not be moved except as provided by general law. Branch offices for the conduct of county business may be established elsewhere in the county by resolution of the governing body of the county in the manner prescribed by law. No instrument shall be deemed recorded in the county until filed at the county seat according to law.
Amended, general election, Nov. 5, 1974.

3. Selected Provisions of Fla. Stat. ch. 125 (1981).

125.01 Powers and duties. –

(1) The legislative and governing body of a county shall have the power to carry on county government. To the extent not inconsistent with general or special law, this power shall include, but shall not be restricted to, the power to: . . .

125.60 Adoption of county charter. – Any county not having a chartered form of consolidated government may, pursuant to the provisions of ss. 125.60-125.64, locally initiate and adopt by a majority vote of the qualified electors of the county a county home rule charter.

125.61 Charter commission. –

(1) Following the adoption of a resolution by the board of county commissioners or upon the submission of a petition to the county commission signed by at least 15 percent of the qualified electors of the county requesting that a charter commission be established, a charter commission shall be appointed pursuant to subsection (2) within 30 days of the adoption of said resolution or of the filing of said petition.

(2) The charter commission shall be composed of an odd number of not less than 11 or more than 15 members. The members of the commission shall be appointed by the board of county commissioners of said county or, if so directed in the initiative petition, by the legislative delega-

tion. No member of the Legislature or board of county commissioners shall be a member of the charter commission. Vacancies shall be filled within 30 days in the same manner as the original appointments.

125.62 Charter commission; organization.–

(1) A charter commission appointed pursuant to s. 125.61 shall meet for the purpose of organization within 30 days after the appointments have been made. The charter commission shall elect a chairman and vice chairman from among its membership. Further meetings of the commission shall be held upon the call of the chairman or a majority of the members of the commission. All meetings shall be open to the public. A majority of the members of the charter commission shall constitute a quorum. The commission may adopt such other rules for its operations and proceedings as it deems desirable. Members of the commission shall receive no compensation but shall be reimbursed for necessary expenses pursuant to law.

(2) Expenses of the charter commission shall be verified by a majority vote of the commission forwarded to the board of county commissioners for payment from the general fund of the county. The charter commission may employ a staff, consult and retain experts, and purchase, lease, or otherwise provide for such supplies, materials, equipment and facilities as it deems necessary and desirable. The board of county commissioners may accept funds, grants, gifts, and services for the charter commission from the state, the Government of the United States, or other sources, public or private.

125.63 Proposal of county charter. – The charter commission shall conduct a comprehensive study of the operation of county government and of the ways in which the conduct of county government might be improved or reorganized. Within 18 months of its initial meeting, unless such time is extended by appropriate resolution of the board of county commissioners, the charter commission shall present to the board of county commissioners a proposed charter, upon which it shall have held three public hearings at intervals of not less than 10 nor more than 20 days. At the final hearing the charter commission shall incorporate any amendments it deems desirable, vote upon a proposed charter, and forward said charter to the board of county commissioners for the holding of a referendum election as provided in s. 125.64.

125.64 Adoption of charter; dissolution of commission. –

(1) Upon submission to the board of county commissioners of a charter by the charter commission, the board of county commissioners shall call a special election to be held not more than 90 nor less than 45 days subsequent to its receipt of the proposed charter, at which special election a referendum of the qualified electors within the county shall be held to determine whether the proposed charter shall be adopted. Notice of the election on the proposed charter shall be published in a newspaper of general circulation in the county not less than 30 nor more than 45 days before the election.

(2) If a majority of those voting on the question favor the adoption of the new charter, it shall become effective January 1 of the succeeding year or at such other time as

the charter shall provide. Such charter, once adopted by the electors, may be amended only by the electors of the county. The charter shall provide a method for submitting future charter revisions and amendments to the electors of the county.

(3) If a majority of the voters disapprove the proposed charter, no new referendum may be held during the next 2 years following the date of such disapproval.

(4) Upon acceptance or rejection of the proposed charter by the qualified electors, the charter commission will be dissolved, and all property of the charter commission will thereupon become the property of the county.